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No. 634

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IN THE

Supreme Court of the United States

October Term, 1957

A. MASCHMEIJER, JR. INC.,

Petitioner,

—against—

EASTERN MOTOR EXPRESS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME G. GREENSPAN,
169 William Street,
New York, N. Y.
Attorney for Petitioner,

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, A. Maschmeijer, Jr. Inc. (defendant below), a corporation organized under the Laws of the State of New York, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which was filed September 12, 1957, reversing a judgment of Conger, *J.* which was entered in the United States District Court for the Southern District of New York, on September 27, 1955, dismissing the complaint of respondent (plaintiff below) on the merits and remanding the same for proof of damages and affirming the lower court's failure to make certain findings.

The opinion of the Court of Appeals, made a part of the Appendix to the petition is reported in 247 Fed. 2d 826, and the opinion of the District Court, Conger, *J.* is reported in 141 Fed. Supp. 477, and is set forth in full on pages 43a to 64a of the Appendix of plaintiff-appellant-respondent in the court below. The decision in this case is of great importance to shippers and common carriers because of the effect of the rule enunciated in loss and damage cases under the Interstate Commerce Act, 49 U. S. C. A. Section 20 (11), and 319.

It is respectfully submitted that this decision is in conflict with a decision of the 3rd Circuit Court of Appeals, in the case of *Commodity Credit Corp.* v. *Norton,* 161 Fed. 2d 161; also decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision and to settle the issue.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1). The judgment of the Court of Appeals reversing the judgment of the United States District Court for the Southern District of New York was entered on September 12, 1957, having been argued on June 12-13, 1957, and decided September 12, 1957; Clark, *Chief J.* and Chase, *C.J.*, and Hincks, *C.J.*, which was unanimously reversed and remanded.

Questions Presented

1.

The Court of Appeals erred in reversing the finding of the Trial Judge who found that there was no question of fact as to breach of warranty (a) as there was no proof of reliance (b) that an implied warranty was excluded under the law (c) that the drums afforded reasonable protection.

The second cause of action was based on the theory of breach of warranty express and implied. Such a cause of action is predicated on proof of a reliance.

> *Rich* v. *Minolfi*, 157 App. Div. 783, aff. 215 N. Y. 666;
>
> *Economy Bldg. & Loan* v. *West Jersey Title Co.*, 64 N. J. L. 27, 44 A. 854.

In the instant case there was a complete failure of proof of reliance for an express warranty and the trial judge so found as a fact when he said:

> "There is nothing in plaintiff's case indicating in the slightest that the words of the bill of lading formed any significant part in plaintiff's determination to carry the load."

The express warranty claimed by the respondent related to fitness and condition of the drums as tendered for transportation. The language is as follows:

> "This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation ac-

cording to regulations prescribed by the Interstate Commerce Commission."

The implied warranty is as stated from the complaint:

"13. That the delivery of the said methyl phenyl acetate to the plaintiff by the defendant on or about the 2nd day of May, 1949, constituted a warranty, implied in law and in fact, that the said chemical was packed in a safe and proper fashion and that the containers in which the chemical was packed were in good and serviceable condition, and were sufficient to withstand, without harm, damage or leakage, the normal hazards and incidents of transportation.

14. That in truth and in fact, the said containers, or some of them, were not in the said condition and were unable to withstand the normal hazards and incidents of transportation and did in fact, without fault upon the part of the plaintiff, leak and open and permit the chemical contained therein to leave the container, all to the damage of the plaintiff as aforesaid."

It is apparent that the implied warranty is the identical fitness and condition of the express warranty, which under the law is excluded. The Court of Appeals, it is respectfully submitted, erred in reversing the judgment on the implied warranty, when the trial judge found as a fact that there was a failure of proof of reliance.

DeWitt v. *Berry*, 134 U. S. 306, was an action for damages on sale of turpentine on an express warranty of quality. It was also claimed that there was an implied warranty. Mr. Justice Lamar, in passing on the point stated:

"It is the existence of the express warranty or its absence which determines the question. In the case

> at bar there was an express warranty of quality in terms. * * * The law is well settled that under such circumstances, implied warranties do not exist."

and further:

> "There are numerous well considered cases that an express warranty of quality excludes any implied warranty that the articles sold were unmerchantable or fit for their intended use."

Even the case of *Hoisting Sales Engine Co.* v. *Hall*, 237 N. Y. 30, 142 N. E. 342, which is cited by the Court of Appeals as authority for its statement that under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made as against latent unfitness, supports petitioner's argument, at page 35:

> "This case was not tried on the theory of express warranty, so let us proceed to consider the implied warranty if any. If there be an implied warranty in the hiring of machinery for a special purpose that it is or will be fit for such use or at least will work, then the warranty may be proved or implied even though the hiring was by written agreement containing *no warranty*." (italics supplied)

Can it be said, that when a shipper tenders a shipment to a common carrier complying with its tariff rules and regulations, and properly describing the commodity and using the type of container for the same, for which a clean bill of lading is issued, that there is an implied warranty of fitness of the container against damage from *any* cause imposing the liability on a shipper of an insurer? If so, a a drum container with heavier bottom and sides when subjected to negligent abuse and rough handling in transit

would also leak, and the carrier need only claim a breach of implied warranty without excuse or reason therefor. So too, a new drum would leak as was proven in *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314. It would be much simpler for a carrier to require a drum container with more particularity as to specifications to take advantage of a breach of warranty. As the proof showed, the drums fully complied with the tariff regulations and so found as a fact by the trial judge. It was further found that the regulations "do not require a drum that shall never leak merely one affording reasonable protection, etc.". That is all that can be said for the packing rule, prepared by the carriers for their own protection. To require more than reasonable protection, fitness and strength of the drum would impose more of an obligation than is required by other standards and analogy, as for instance, seaworthiness of a vessel on a claim for a cargo loss by breach of warranty which is similar to the claim herein. It is said that seaworthiness test is whether the vessel is *reasonably fit* to carry the cargo which she has undertaken to transport. *Reasonably fit* is the commonly accepted test, (italics supplied), *The G. R. Booth,* 171 U. S. 450; *The Kensington,* 183 U. S. 263; *Knott* v. *Botany Mills,* 179 U. S. 71; *Lester* v. *U. S. A.,* 234 Fed. 2d 625; Reasonable is the word that is used throughout rule 5 of the tariff. Reasonableness is the normal test applied in all types of dealings, especially in negligence matters. The trial judge found as a fact that the drums afforded reasonable protection and such a finding is usually followed by this court, *The Southwark,* 191 U. S. 1, 13.

In cases involving loss and damage under 49 U. S. C. A. 20 (11), it is contrary to law that a shipper of general com-

modities and a common carrier should both be held liable as insurers. This application of the law conflicts with the basic theory of a common carrier's legal obligation as an insurer, especially since the carrier is best able to explain the cause for the loss. In the instant case the photos vividly show that the drums were out of shape and banged up after the transportation was completed, caused entirely by carrier and against which the petitioner could not impliedly warrant the drums as fit. The complaint as shown by the 13th and 14th allegations is implicit in this regard, for it is alleged that the drums,

> "were sufficient to withstand, without harm"

and that in truth and fact were unable to withstand

> "without fault upon the part of the plaintiff".

But there was no explanation from respondent for the bad physical condition of these drums after transportation was completed. This bad physical condition was caused by the fault and harm of the respondent. The Court of Appeals erred in stating that the facts imperatively required that petitioner breached an implied warranty under the common law as recognized by the packing rule:

(1) The trial judge found a compliance with tariff and packing rule.

(2) Respondent as an insurer was obliged to explain the cause for the bad physical condition of the drums as shown by the pictures, as such condition was caused by its fault and harm.

(3) This was not the ordinary contract of bailment, but of a special liability, approximating that of an insurer.

Hanes v. *Shapiro and Smith*, 84 N. E. 33, 35.
Sams v. *Cochran and Ross*, 125 S. E. 626.

(4) Uncontradicted proof that the drums sustained damage by the fault of respondent, as shown by photos, and by proof of the physical condition of the drums before and after completion of transportation.

(5) Examination and inspection of the drums prior to acceptance for transportation, does not under the law imply the obligation or warranty of reasonable fitness or capability of the article.

Gaffey v. *Forgione and Romano*, 137 A. 218.
Rainbow Petroleum v. *Union Drilling*, 1 Pac. 2d 489.

Any explanation for the bad physical condition of the drums, would indicate the futility of respondent's position, because, if the answer is that the drums as tendered were in the condition as shown by the photos, the rule of *Thompson* v. *C. M. St. & P. RR.*, 217 N. W. 927, *Hannibal RR.* v. *Swift*, 12 Wall. 262, *Gaffey* v. *Forgione*, *supra*, and *Rainbow* v. *Union Drilling*, *supra*, would apply. If as shown by the bill of lading and the proof that the drums were in good condition when tendered, then what is depicted by the photos was caused by its negligent rough handling and abuse in transportation as the proximate or contributing cause for the loss to impose liability as a common carrier.

The Court of Appeals therefore erred in reversing the judgment by applying the wrong rule of law for absolute liability for breach of warranty. The cases of *Overbury* v. *Platten*, 188 Fed. 2d 155, and *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612, were cases of ordinary bailment.

In neither was there a special agreement of a common carrier, namely as an insurer. As was indicated in *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104:

> "Hence, we are not concerned with the rules that one who has assumed the obligation of a common carrier can relieve himself of liability to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexed to his undertaking, or for which it permits him to stipulate, the burden rests upon him to show the loss is due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary bailee but because he is a special type of bailee who has assumed the obligation of an insurer."

Petitioner in the exercise of care proved what tests and inspections were made prior to filling each drum and before shipment, which the court stated were irrelevant. Nevertheless, there was additional proof of the bad physical condition of the drums after the transportation which was very persuasive evidence of the cause of the leaks, imposing upon the respondent the obligation to sustain its burden on the whole case. In *Commercial Corp.* v. *N. Y. Barge Corp., supra,* it was said:

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the facts in issue and to account for the loss which it is

> alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him * * *. If the bailee fails, it leaves the trier of the facts free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely."

Commercial Corp., v. *N. Y. Barge Corp., supra,* is authority for the statement that breach of warranty is also a matter of burden of proof. Respondent as shown by its complaint, alleged that the drums were warranted to be in good and serviceable condition, and were sufficient to withstand, *without harm, without fault on its part the normal hazards and incidents of transportation.* The bad physical condition of the drums as shown by the photos after transportation was completed, was not part of the normal hazards and incidents of transportation. There was no further proof on respondent's part to explain such bad condition. In this regard therefore, it failed to sustain the burden of proof to establish the cause of action for breach of warranty on the whole case. (Italics supplied)

2.

In a common carrier's action against a shipper for negligence and breach of express and implied warranty, is not the carrier an insurer who has the burden of proof on the entire case?

The complaint in the action contained two (2) causes of action, negligence and breach of an express and implied warranty. Stated simply, the carrier respondent accepted for transportation a shipment from petitioner containing a liquid general commodity known as methyl phenyl acetate in 30-55 gallon metal drums on May 2, 1949, at Newark, N. J. consigned to Eli Lilly & Co. at Indianapolis, Indiana, for which a clean bill of lading was issued, after inspection and loading onto the trailer. There is no question of fact that the liquid was properly described and that the drums complied with carrier packing rule in the tariff governing the movement. This is admitted. En route, two (2) of the drums leaked, causing damage for which this action was instituted. Respondent's proof, by a metallurgist indicated a break in the bottom of each drum as having been caused by fatigue, and it further contended this was a latent defect for which it was not liable as a common carrier. Petitioner then offered proof without any contradiction that the shipment was tendered to respondent a common carrier, as a truckload. That petitioner loaded the 30 drums into an empty trailer by rolling same on the floor on the side of each drum and leaving them in such position. That respondent's employees up-ended the drums in order to load other merchandise on the floor, as the drums were placed along the sides and front of the trailer. That respondent did not

secure, brace, or block the drums from falling, chafing, jarring, jolting, shifting and bumping in transit, nor utilize skids or pallets which were available to raise other merchandise from the same floor level. With respect to such an obligation or requirement, this Court stated in *A. T. S. & F. RR.* v. *U. S.*, 232 U. S. 199.

> "as a general rule the carrier loads all freight tendered in less than carload lots."

and again in the same case:

> "Loading may involve more than placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make transportation safe. • • • ."

and in *Hover* v. *D. & R. G. W. R. R.*, 17 Fed. 2d 881, the court said:

> "The loss or leaking of drums may have been caused by many other things • • • as for instance • • • failure to properly secure drums, or proper bracing the other merchandise, loosening and shifting of load."

The load was tendered as a truckload and paid for as such. When the other merchandise was loaded into the trailer, the entire load became less than truckload shipments imposing the obligation upon respondent to secure the same. Nothwithstanding, petitioner offered photographic proof of the bad physical condition of the drums due to such failure to brace, block and secure, and negligent abuse and rough handling in transportation to which each was subjected as the direct or contributing cause for

the leak and damage. These photos were taken at respondent's terminal after transportation was completed, and are being submitted to this Honorable Court as part of the exhibits with the petition herein being filed so that an independent determination of abuse and rough handling as negligence, may be made of what is depicted.

After an examination is made of the photos, the next question that is presented, namely, was not the bad physical condition proof of negligent abuse and rough handling in transportation as the proximate or contributing cause of the leaks, requiring affirmative proof or explanation from the respondent. Respondent offered neither. Its expert metallurgist stated his answer to the following question:

> "These pictures which I have just shown you of drum number one and two have dents in the sides of each drum, did you notice that"

to which he replied with emphasis:

> "Those pictures certainly showed that!"

Petitioner's witnesses stated without contradiction that the drums in the banged up and out of shape condition as depicted would not have been used in preparation for a shipment of a liquid commodity. In other words, after respondent proved the alleged cause for the leaks and damage, as a latent defect, the burden of going forward with evidence was cast upon petitioner and facts were offered to show that such drums when tendered and accepted for transportation were in good physical condition, during which time the same were subjected to negligent abuse and rough handling causing them to become banged up and out

of shape, as a result of which each was physically changed for the worse, all without any contradiction by respondent.

With such evidence, the burden of going forward with proof was cast upon respondent to make some answer or explanation that the loss was caused solely and only by the alleged latent defect, which it failed to do. This was compelled because respondent was seeking to be relieved of its liability of an insurer by attempting to prove a shipper fault as an exception under the bill of lading, and petitioner proved by the photos that the drums in transportation were banged up and out of shape and not in the same condition when tendered, through negligent abuse and rough handling as the proximate or contributing cause of the leaking drums.

> *Barnet* v. *N. Y. C. & H. R. R.*, 222 N. Y. 195;
> *Taschman* v *Penn. R. R.*, 230 Fed. 2d 87;
> *Farr Co.* v. *Union Pacific R. R., C. C. A. Col.* 106 Fed. 2d 437.

The Court of Appeals in its opinion, impliedly concedes that had skids or pallets been used, the other merchandise would not have been damaged. But because of the pervasive odor of the liquid, the other merchandise was damaged. This is in the following language.

> "Skids and pallets apparently would not have avoided damage to other merchandise caused by the pervasive odor of m.p.a."

Petitioner urges that this damage by odor was caused by carelessness of respondent because it failed to exercise care and precaution in choosing what kind of merchandise to load into the same trailer, since a common carrier is required to know the characteristics of the property it

transports. As was stated in *Beard* v. *I. C. R. R.*, 44 N. W. 800, 801.

> "We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from Cairo Short Line for transportation to New Orleans, without directions or instructions as to character in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. *He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which in the exercise of due care may be averted or counteracted.* * * * *The nature of the goods must be considered in determining the carrier's duty.* Some metals may be transported in open cars. Many articles of commerce, when transported must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when distance of transportation demands it. Fruit and some other perishables must be carried with expedition and protection from frost. *So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment.* (Italics supplied)

There is sufficient proof for a finding that respondents' acts and conduct, namely (1) failing to brace, block and secure the drums, (2) failure to utilize skids or pallets which were available, (3) failure to recognize the characteristics and nature of a shipment of liquid methyl phenyl acetate in drums by loading with it other merchandise subject to being damaged by the pervasive odor, (4) negligent abuse and rough handling of drums in transportation, any one or all of which together would be cause proximate or contributory for the loss, compelling answer or expla-

nation from respondent, as a common carrier, who had the burden of proof, on the whole case as the plaintiff.

Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104.

Under the rule now enunciated by the Court of Appeals, a common carrier is liable only for negligence and the burden of proof to explain the cause of loss is changed from that of the common carrier to the shipper. *Commodity Credit Corp.* v. *Norton*, 167 F. 2d 161, held to the contrary, and it is necessary therefore that this Honorable Court should clarify the rule of liability of a common carrier as an insurer, and the burden of proof in actions for loss and damage arising under the Interstate Commerce Act, because of its importance in commerce and for the benefit of shippers and carriers alike, and to resolve the alleged conflict between the Circuit Courts.

3.

Does a shipper assume the liability of an insurer when it tenders for transportation to a common carrier which accepts for transportation a drum containing a liquid general commodity, which drum complies with carriers packing requirement, and for which a clean bill of lading is issued?

Respondent's witness, Mr. Brown admitted that the drums used to contain the liquid general commodity which was properly described on the bill of lading, complied with its tariff requirements. The requirement merely specified *a* drum be utilized to contain the liquid, and for this pur-

pose, a used drum satisfied the rule, provided it also complied with Rule 5 sub. 8 of Tariff MF-ICC. No. 17, which provides:

> "barrels, * * * drums * * * must be made of wood * * * metal of such strength as to afford safe handling, reasonable and proper precaution of contents, and to protect against damage to other freight."

When the shipment of the 30 drums was tendered to respondent, its driver examined and inspected each drum for leaks and to make certain they were in good condition, after which he issued a clean bill of lading for the property. This bill of lading, petitioner contends indicated a compliance with the packing rule, carrier's satisfaction of the condition of the drums and that each complied with the tariff regulations. Nothing more was required to be done by petitioner. The proof shows further and without any contradiction that petitioner made several tests and inspections in exercise of its due care of each drum to determine fitness and suitability, even though respondent's metallurgist stated that there was no known test to determine suitability, other than common sense when one sees dents, or other evidence of age or misuse. Nevertheless, the Court of Appeals, held that the petitioner's liability was absolute as a bailor-warrantor, namely as an insurer. This we believe to be an incorrect statement. Perhaps what was intended, required petitioner to comply with the tariff regulations as an absolute duty, which the trial judge found as a fact. On the facts, certainly the Court of Appeals could not have intended to impose such a broad legal liability of an insurer on petitioner, which up to present time has only been applied to shippers of dangerous and explosive merchandise, under certain conditions.

The obligation under the law of a shipper of dangerous and explosive merchandise is that of an insurer and absolute, if without previous full written disclosure to the carrier it tenders a shipment of such merchandise which causes damage in transit. This is included in the 6th clause of the terms and provisions of the bill of lading. Certainly, this strict rule of law was never intended to apply to a shipper of a liquid general commodity prepared in a drum container which fully complied with the tariff regulations and which commodity was properly described on the bill of lading? If such was the intendment of the Court's opinion, the full impact has not been fully understood. With the decision as it now stands, a shipment of a liquid general commodity in *any* type of container is now at the peril of shipper, even though the common carrier has control of the goods and is in a beter position to explain the loss. (Italics supplied)

But even if the court intended to rule that the petitioner has the same liability of a shipper of dangerous and explosive merchandise, still it could not stand because the complaint was not so predicated. This, then is the first reported case of a shipment of a liquid general commodity which applies the same rule of liability for a shipment of dangerous and explosive merchandise.

In the very early case of *Zerega* v. *Poppe*, Federal case No. 18213, relating to transportation of a liquid, the court said:

> "It is not sufficient, in case of damage to goods received under a bill of lading which acknowledged that they were received in good order for the carrier to show that the goods were delivered to him, in insufficient packages, and that the defect was not discover-

able by him. *To relieve him from liability he must also show that the loss actually resulted from such insufficiency and from no fault* of his." (Italics supplied)

In this respect, respondent failed to offer any proof to explain the out of shape and banged up condition of the drums as depicted by the photos, introduced to show its negligence by abuse and rough handling in transit, as the proximate or contributory cause for the loss.

Respondent, with the evidence indicated, was required to go forward to prove that the damage resulted *only* from metal fatigue and not from any cause for which it may be liable proximate or contributory, such as the rough handling and abuse in transportation, failure to use skids or pallets, failure to secure, brace and block, or in the exercise of proper care that it was safe to load other merchandise on the same vehicle knowing the characteristics of methyl phenyl acetate. (Italics supplied)

Barnett v. *N. Y. C. & H. R. R. Co.*, 222 N. Y. 195;
Thompson v. *C. M. St. P. & P. R. R. Co.*, 217 N. W. 927;
Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104.

4.

May a common carrier accept for transportation a shipment of a liquid general commodity in drum containers which indicate age, misuse, are out of shape and banged up upon visual examination and inspection, and in common sense issue a clean bill of lading, and upon loss contend a latent defect was the cause?

Respondent's metallurgist emphasized the fact that the photos certainly showed dents in the sides of each drum, and on further examination to questions:

> "What would be the usual and ordinary tests which would reveal a deteriorated condition of the drums as you have seen."

he replied:

> "Aside from corrosion, there is no feasible test to assess in a practical sense any damage which is stored up in a used drum."

and further:

> "As a matter of fact, isn't it also true that there is no known test that is known to the layman to determine whether a drum is suitable or not, if it is not new?

to which he replied:

> "Nothing other than his common sense if he sees gross dents, or other evidence of age or misuse."

The proof showed one drum as having been manufactured in 1943, and the other in 1947. Certainly then as part of the visual examination and inspection, and common sense

in accepting a shipment of liquids in used drums, the age, misuse and condition were fully patent. If the drums were as bad on tender as shown by the photos and as testified by respondent's metallurgist, as a matter of fact and law they were patently unfit for the shipment, and a common carrier is not obliged to accept any shipment in such condition. Respondent was then within its legal right to refuse the shipment because the bad physical condition of being banged up and out of shape, age and misuse were obvious and common sense dictated that drums so tendered were not sufficient and adequate to afford safe handling, with reasonable and proper precaution of the contents and to protect against damage to other freight. When the loss occurred, respondent could not claim a latent defect, and such was the holding in *Thompson* v. *C. M. St. P. & P. R. R.*, 217 N. W. 927, where the court said:

> "When a shipper tendered to a carrier goods for transportation, which are insufficiently crated, boxed, or loaded, and such insufficiency is discoverable by carrier upon ordinary observation and inspection, it is the duty of the carrier to refuse to receive the goods, and • • • *if the carrier does accept the goods it may not thereafter allege that the injury which they sustain in the course of transportation was due to such insufficient crating, boxing, packing or loading.*" (Italics supplied)

This is even more apparent because respondent's tariff provided this privilege:

> "The carrier will refuse to handle any article not in such condition or so prepared for shipment as to render transportation thereof reasonably safe and practicable."

Hannibal R. R. v. *Swift,* 12 Wall. 262, is authority for the following:

1. A carrier has the right to inspect proffered shipments and to refuse their acceptance when not in fit condition for transportation.

2. That if unfit for transportation, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may if he can, conform the shipment to a fit condition for transportation.

3. That the acceptance of a shipment for transportation without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

From this, the carrier respondent may not close its eyes, or look the other way, when shipments are so tendered. The carrier must assume its obligation by refusing to accept, or accept the same with attendant liability.

Respondent was therefore obliged to offer some proof, or explanation for its negligence in causing the bad physical condition of the drums after the completion of transportation as depicted by the photos. Not having done so, petitioner contends as a matter of law that the respondent failed to sustain its burden of proof as a common carrier on the whole case, as such bad condition was brought about by negligent rough handling and abuse; failure to secure, brace and block; failure to use skids and pallets; and loading other merchandise not suited to be mixed into a load with methyl phenyl acetate knowing its characteristics.

which separately or together was the proximate or contributory cause for the leak and the damage.

To restate petitioner's position, on either basis, the Court of Appeals erred in reversing the lower court for (1) respondent's failure to sustain the burden of proof as a common carrier in failing to explain the cause for the bad physical condition of the drums as depicted by the photos taken after the transportation was completed, (2) assuming that petitioner tendered to respondent the drums in the condition as shown by the photos, still by reason of the age, misuse, physical condition and common sense after examination and inspection, the rule in *Hannibal R. R.* v. *Swift, supra,* and *Thompson* v. *C. M. St. P. & P. R. R., supra,* applies.

Petitioner was also entitled to a finding of fact that the photos represented proof of a bad physical condition of drums upon tender of the same, either before transportation, or that such condition was caused in transportation; that there was no contrary proof that the drums were in bad physical condition after the completion of transportation; that there were no facts or circumstances showing the improbability that negligent abuse and rough handling caused the drums to become out of shape, banged up and to leak, either as the proximate or contributory cause of the loss, to entitle it to an affirmance of the judgment dismissing the complaint.

Beck v. *Sheldon*, 48 N. Y. 365, 369.

5.

As a matter of law the Court of Appeals erred by reversing a judgment which is fortified by the discretion of the trial judge who reserved decision on petitioner's motion for dismissal at end of respondent's case and again at end of trial which was supported by proof of the record for a dismissal of the complaint.

Statement of the Case

Petitioner, a New York corporation, was sued by respondent a foreign corporation engaged as a motor common carrier of property under the jurisdiction of the Interstate Commerce Commission, in the United States District Court for the Southern District of New York, on the basis of diversity of citizenship and that the amount involved was in excess of the sum of $3000.00, for negligence. Subsequently, upon motion an order was entered permitting respondent to serve an amended complaint alleging a second cause of action for breach of warranty, express and implied. All of the affirmative defenses and denials contained in the answer were deemed to apply to this second cause of action. On May 2, 1949, at Newark, N. J., petitioner tendered in good condition to respondent as a common carrier, 30 - 55 gallon drums of methyl phenyl acetate, weighing 15,622 pounds as truckload shipment of 25,000 pounds for transportation to Eli Lilly & Co. at Indianapolis, Indiana, for which a clean bill of lading was issued, after examination and inspection of the physical condition of the drums. Petitioner's employees loaded the drums onto the trailer floor and left the same lying on their sides. An employee of respondent up-ended each drum and placed

the same along the sides and front of the trailer. Petitioner was unaware that respondent intended to load any other merchandise into this vehicle. Other merchandise was later placed on the floor of the vehicle at respondent's terminal. That while respondent had skids and pallets at its terminal to raise merchandise above the same floor level of the drums to protect such property against possible leaks, or other damage, such protection or care was not taken. It was shown by proof (pages 7, 165 of appendix) that had skids been used, the general merchandise could not have been damaged by leaks because the same would have been raised 4-6 inches above the floor. That the drums were not secured, braced or blocked prior to loading other merchandise or at any other time before taking off for destination (pages 83-84, app.). That travel was over a lot of hills and speed was between 25-52 miles an hour. During transportation the driver smelled an odor, saw leakings from the trailer and made an investigation en route, and at destination two (2) drums were found to be empty. Respondent's metallurgist stated that a break in each drum was caused by fatigue, and that one drum was manufactured in 1943, and the other in 1947. That the only way to detect fatigue was by microscopic investigation at a laboratory. That there was no known test to inspect a drum for purposes of determining fatigue (401-402, app.). He did admit that jarring, jolting, vibration, shifting, bouncing, bumping, road conditions, how a drum is set in a truck and falling in transit were all contributing factors to reduce service life of a drum (407 app.). Photos taken after completion of the transportation of the external condition of drums showed each to be out of shape and banged up, while in respondent's custody as a common

carrier, for the purpose of showing negligent abuse and rough handling to which each was subjected. That such bad physical condition was not the same condition in which the drums had been tendered to respondent on May 2, 1949. That the age of the drum, gauge, condition and capacity were visible to the naked eye.

That respondent's traffic service manager admitted that methyl phenyl acetate was not a dangerous commodity, and that it was covered by the general commodities tariff which governed the movement; that there was no special or particular type of drum required for the packing, and that a used drum could be utilized for the shipment of this liquid as it complied with all regulations. In addition, he stated that a new drum was not required for this type of merchandise, although he thought a new drum should have been used.

Petitioner's proof showed its exercise of care and precaution in that each drum was actually tested and inspected for fitness and suitability before filling, after which each drum was left standing or on its side, for tests of leaks, if any, prior to being tendered for shipment.

At the end of respondent's case, a motion was made by petitioner to dismiss for failure to prove any case for negligence or for breach of any warranty. The decision was reserved and then petitioner offered proof to show the actual condition of the drums when tendered for transportation; the condition of the same drums after completion of transportation by the photos, which depicted the same to being out of shape and banged up, to establish negligent abuse and rough handling which was either the proximate or contributory cause for the leaks and damage. This proof was supported by respondent's metallurgist,

by his statement that jarring, jolting, vibration, shifting, bouncing, bumping, and road conditions besides the manner of setting a drum in the truck were contributing factors to reduce service life (407), and he also emphasized that the containers certainly showed the dents in their sides. Respondent offered no proof to show that bracing, blocking, and securing of the drums was not necessary in the face of such strong evidence of change of condition, *Tuschman* v. *Penn. R. R.*, 230 Fed. 2d 787, nor to explain the cause of the dents, or how each drum became out of shape and banged up, which was positive proof of rough handling and abuse; nor did respondent prove other than that the drums were in good condition when tendered; and two of petitioner's witnesses testified without contradiction that the condition of the drums as shown by the photos would not have been used at all.

Respondent failed to prove any reliance on the warranty and the trial judge made such a fact finding. He further found that the drums complied with tariff regulations, satisfied respondent as to its condition after examination and inspection, for which it issued a clean bill of lading, otherwise the shipment could have been rejected. He further found as a fact the tariff regulations merely require reasonable protection and the the liquid was properly described on the bill of lading. Such was the posture of the evidence.

The decision of the trial judge was based upon the ruling of *Commodity Credit Corp.* v. *Norton*, 168 Fed. 2d 161, which was identical on the facts, except that a carrier is suing in the instant case, whereas the shipper sued for damages under 49 U. S. C. A. 20 (11). Nevertheless, the rule of law is the same in both cases.

The implied warranty claimed by respondent is equivalent to the exception in the bill of lading, namely the act or default of the shipper. From a reading of the facts in the *Norton* case, *supra,* it appears that a shipment of castor seed oil in used barrels was tendered to the carrier for rail transportation from Norfolk, Va. to Edgewater, N. J. During the trip, it was found that the barrels had aked. At destination, some of the barrels were found to be empty, and an action was brought by the owner for the loss. After judgment was rendered for the defendant, an appeal was taken for failure of the court to direct a verdict for the plaintiff. The plaintiff had relied on the liability of the defendants as common carriers, and upon the presumption said to be effective that when a delivering carrier is sued, that the damage occurred on its line. The plaintiff contended as a matter of law that the defendant was liable because

1. The barrels were in actual good order and condition when received and were delivered in bad condition.
2. If the barrels were defective, the defect was patent.
3. If the defect was latent, it had become patent during the course of transportation.
4. Defendant was negligent in the handling and care of the shipment and such negligence was the proximate cause of the loss.

The judgment was reversed for error in the charge, and it is respectfully urged that the Second Circuit Court of Appeals fell into the same error as the learned trial judge in the *Norton* case, as is indicated from the following language:

"except in such a case, where as asserted here, the goods were shipped in containers which seemed to be to reasonable observation proper, but which contained defects which were not observable, latent defects, which defects caused the loss."

After discussing the matter of burden of proof and the facts, the trial judge said in the charge:

"Now, then, if you believe from the evidence that the barrels, to all seeming were in a state proper for shipment and that there were no patent or openly observable defects; and that the railroad company accepted them and placed them on the cars required for their shipment,—four cars as the Court recalls it—and if you find from the evidence that the stowage or stowing of these was proper, and if you find that there was nothing unusual in the method of transport, then you would ask yourselves whether or not the questions which I have indicated to you have been met; *whether or not there was an observable defect, and whether there was rough handling such as would put the responsibility on the carrier. If you find that there was the ordinary, acceptable handling in the shipment in the transfer of these various railroads, and if you find that there was no observable defect, then you will apply to those facts, if you so determine, the rule which I have outlined, and there would seem to the Court to be no legal responsibility on the part of the defendant company.* * * If you find, further, that, having accepted the goods which were in proper shape for shipment, that the railroad was then guilty of any mishandling or improper stowage such as would constitute negligence and that was the proximate cause of the leakage, then you properly could be said to be entitled to find responsibility on the part of the defendant." (Italics in report)

With respect to this charge, the Third Circuit Court of Appeals, said:

> "The error in the charge, we think is brought into sharp relief by the italics. The learned trial judge instructed the jury that 'rough handling', or 'ordinary acceptable handling' would make a difference in the result of the case where there was 'no observable defect' in the shipment upon receipt by the carrier. *That is not the law. As the cases already cited plainly establish the carrier is responsible without regard to the exercise of due care*, even though the damage or loss be occasioned by the independent act of third persons."

and again:

> "We conclude that the jury was told the liability of the defendant was that of an insurer, upon the specific application of the rule by the court below to the facts, the jury was erroneously let to believe that in the event it found the goods 'in proper shape for shipment' the defendant would be responsible only if it were negligent."

Petitioner has always contended that respondent merely proved its due care in the handling of the drums; that such proof was not sufficient to be relieved of its liability as a common carrier; that what was required, compelled proof by respondent to show how the loss was caused and that it was without fault on its part contributing thereto. Respondent had the burden of going forward with proof to explain the banged up and out of shape condition of the drums as shown by the photos which were taken after the transportation had been completed, which indicated its negligence in transportation.

As brought out in the *Norton* case, *supra*, on similar facts, a conflict exists between the Circuit Courts, calling for an exercise of this Court's power of supervision. The reversal of the judgment in the lower court was based on respondent being a bailee and liable only for negligence, whereas respondent was a common carrier and liable as an insurer, and therefore erroneous.

Reasons for Granting the Writ

1. The decision in this case represents the first reported determination in any jurisdiction against a shipper of a general commodity, wherein the rule of absolute liability for shipments of dangerous and explosive merchandise was applied. The only cases where courts have held absolute liability against a shipper either in England or in the United States were cases wherein there was either misbilling or misrepresentation of shipments of dangerous and explosive merchandise. Such cases are:

Bamfield v. *Goole and Sheffield Transport Co.*, 103 Law Times 201;
Great Northern Railway Co. v. *L. E. P.*, 38 Law Times Reports 711;
Pierce v. *Winsor*, 19 Fed. Case 11151;
Boston etc. v. *Shanley*, 107 Mass. 568.

The decision is important nothwithstanding (a) that at the time of tender of the shipment the drums were in better condition than at the time of delivery, (b) that the commodity methyl phenyl acetate was properly described on the bill of lading, and so found as a fact by the trial judge, (c) that the containers utilized actually complied with

carrier tariff and packing rule, and so found as a fact by the trial judge, (d) a clean bill of lading was issued after inspection and examination and so found as a fact by the trial judge.

2. The determination of this case is in conflict with the decision of *Commodity Credit Corp.* v. *Norton, supra*, in the Third Circuit Court of Appeals, and it is not thought necessary to discuss the same at further length, except that the burden of proof in such a case was properly held to be on the carrier and that the exercise of due care in the handling of a shipment was not sufficient to relieve a common carrier of its liability of an insurer.

3. The determination in this case is on a very important question of federal law which has not been but should be settled by this Court to clarify the rule in loss and damage cases under 49 U. S. C. A. 20(11), namely, does the rule of absolute liability apply to a shipper of a general commodity in the event of a loss, where there is a compliance with carriers tariff regulations in all respects, for which carrier issues a clean bill of lading. The cases cited in the opinion of the Court of Appeals, *Overbury* v. *Platten*, and *Mulvaney* v. *King Paint Mfg. Co., supra*, can be distinguished as neither relates to liability of a common carrier, but to liability of simple bailees. In one respect only, therefore, was there an absolute liability on the part of petitioner, and that was to comply with the tariff regulations, *Davis* v. *Henderson*, 226 U. S. 92. Such a compliance was definitely found as a fact by the trial judge.

4. The determination in this case reversing the judgment of the lower Court for breach of an implied warranty

which did not exist as a fact or in law, was a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

5. The determination in this case has tremendous importance and implications in matters of commerce to shippers, carriers and suppliers of containers which are utilized in interstate shipments of merchandise, and since this is the first appellate determination in any jurisdiction interpreting packing rule of the common carrier motor industry, until a final determination is made, there will be doubt and confusion as to its meaning in future litigation. For that purpose a guide is necessary as an aid for future conduct and to limit litigation.

WHEREFORE, petitioner respectfully prays that a writ of certiorari should be granted and that this Court reverse the Court below and reinstate the original judgment of the District Court entered on September 27, 1955, in as much as the decision of the Court of Appeals is erroneous, or for any other relief as the Court may deem just and proper.

A. MASCHMEIJER, JR. INC.,
By JEROME G. GREENSPAN,
Attorney

Dated: New York, N. Y.
November, 1957.

APPENDIX TO PETITION

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 372—October Term, 1956

(Argued June 12-13, 1957 Decided September 12, 1957)

Docket No. 24377

EASTERN MOTOR EXPRESS, INC.,

Plaintiff-Appellant-Appellee,

—v.—

A. MASCHMEIJER, JR. INC.,

Defendant-Appellee-Appellant

Before:

CLARK, *Chief Judge,*
CHASE and HINCKS, *Circuit Judges.*

From a defendant's judgment in an action tried to the Court, Southern District of New York, Conger, Judge, 141 F. Supp. 477, by a motor-carrier against a shipper for damages caused by latent defects in the shipper's containers, both parties appeal, reversed and remanded.

JEROME G. GREENSPAN, New York, N. Y. for defendant-appellee-appellant.

BERNARD AXLER, New York, N. Y. (Zelby & Burstein, New York, N. Y.) on the brief, for the plaintiff-appellant-appellee.

LOUIS SILVER, Jersey City, N. J., for the National Freight Claims Council of the American Trucking Associations, Inc., Amicus Curiae.

HINCKS, *Circuit Judge*:

On May 2, 1949, a trailer-truck belonging to Eastern Motor Express, Inc. (hereinafter called plaintiff), a common carrier, was being loaded at the plant of A. Maschmeijer, Jr., Inc., at Newark, New Jersey (hereinafter called defendant). The defendant's shipment consisted of 30 drums of methyl phenyl acetate (hereinafter abbreviated to m.p.a.). The driver's helper inspected the drums, found no leaks and gave the defendant a clean bill of lading.

The truck next stopped in Jersey City at the plaintiff's terminal where miscellaneous freight was put in the trailer. This freight was placed in the center while the drums were along the sides and front against the walls.

During the journey, the plaintiff's driver noticed moisture under the trailer and a strange odor. Upon inspection he found the floor damp, some of the miscellaneous freight soaked through, and noticed a leak in one of the drums. The driver testified he had had no accident or collisions along the way. At its final destination, on May 5, the trailer was inspected by the head of the plaintiff's claims

department. The odor was very strong and the trailer was not entered at that time, but it was observed that the underside of the trailer had lost all its paint. Later that day, the trailer was entered. Two drums were found to be leaking and nearby paint had blistered off the saddle tanks and some of the miscellaneous cargo was found to have been destroyed.

The drums had been consigned to Eli Lily & Co., and some time after they were delivered the plaintiff paid Lilly for its loss from the leakage.

In this action the plaintiff is suing for damage to its truck-trailer, the amount paid to Lilly, and for damage caused to the miscellaneous freight belonging to other shippers.

After a trial without a jury, the District Court granted motions to dismiss the complaint. The plaintiff has appealed and the defendant has cross-appealed because of the Court's failure to make certain findings.

The plaintiff alleged claims based on negligence and on breach of warranty. The breach of warranty argument is two-fold. It asserts an implied warranty of fitness and in this connection cites Rule 5, subsection 8(a), of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9. The pertinent part of this rule states: "Barrels • • • drums • • • must be made of wood • • • metal • • • or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods." This rule, the so-called "Packing Rule," was part of the contract in legal

effect—as are all properly authorized tariff rules and regulations published by carriers. *Davis* v. *Henderson*, 266 U. S. 92; *Louisville & Nashville R. Co.* v. *Chatters*, 279 U. S. 320, 331; *American Ry. Express Co.* v. *American Trust Co.*, 7 Cir., 47 F. 2d 16, Cert. den. 284 U. S. 629; *Standard Hotel Supply Co.* v. *Pennsylvania R. Co.*, 65 F. Supp. 439 (S. D. N. Y.).

The District Judge held that the above-quoted rule did "not require that a drum shall never leak * * *" but merely required that the drum afford reasonable protection. We disagree with that interpretation. Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made at least as against latent unfitness. *Hoisting Engine Sales Co., Inc.* v. *Hall*, 237 N. Y. 30, 142 N. E. 342. Thus a shipper in delivering packaged goods for shipment impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment. We think that the Packing Rule (Rule 5, subsection 8(a)), makes it plain that a shipper by motor carrier is within that rule. Indeed, the rule of the common law of bailment is peculiarly appropriate for application to the relationship between shippers and common carriers. For such carriers are under obligation to accept for shipment containers which are not patently unfit for such shipment. In this case, the undisputed facts imperatively required a finding that the defendant had breached an implied warranty existing under the common law as recognized by the Packing Rule. As a defense to the plaintiff's claim of breached warranty, the degree of care exercised by the defendant is irrelevant, for—with exceptions not pertinent

here—the duty of the defendant, as bailor-warrantor is absolute. *Overbury* v. *Platten*, 2 Cir., 108 F. 2d 155; *Mulvaney* v. *King Paint Mfg. Co.*, 2 Cir., 256 Fed. 612.

Since we have sustained the plaintiff's claim of breach of implied warranty, there is no need for us to consider the plaintiff's second warranty claim based on an express certification in the bill of lading or to consider its claim of negligence on the part of the defendant.

Defendant has cross-appealed from the failure of the District Court to make certain findings. It is asserted that it was error not to find the plaintiff guilty of contributory negligence due to its failure to secure or brace the barrels or at least to place the other goods on skids or pallets so that they would be 4 to 6 inches above the floor level above the drums.

The District Judge found that the defendant had failed to prove that failure to brace the drums was negligence. This finding we think well-founded. However, no express finding was made as to the plaintiff's failure to use skids and pallets. The point is not material to the issue of liability under plaintiff's claim of breach of implied warranty. If presented on remand on the issue of damages flowing from the defendant's breach the judge will doubtless give it due consideration and make any required findings. Skids and pallets apparently would not have avoided damage to other merchandise caused by the pervasive odor of m.p.a.

The defendant also asserts it was entitled to exclusive use of the trailer and thus it was not liable for damage to the other goods in the trailer. The District Judge made

several findings on this issue and indicated that, if necessary he would decide it adversely to the defendant. Such a finding is amply supported by the evidence.

The defendant also interposed deviation as defense, arguing that because the plaintiff's driver on the trip west did not follow the route prescribed by the plaintiff, plaintiff was barred from recovering in this action. It cites the old cases dealing with a carrier's absolute liability once it leaves the route contracted for. But these cases are not applicable to the situation presented by the evidence below; none go further than to hold that a carrier who has deviated from the route contracted for may not in the event of a loss avail himself of a special limitation of liability to the shipper contained in the contract of carriage. Nothing in the deviation cases suggests that a deviation by the carrier operates to relieve a shipper, who has breached his implied warranty of the adequacy of the containers from the consequences of his breach.

There is, however, no need to make a definitive ruling as to the effect of a deviation by the plaintiff on the defendant's liability because the record presented fails to show a deviation. In the operative bill of lading the space provided for statement of route was left blank and we find no evidence whatever to show that any particular route was agreed on by the parties or prescribed by the Interstate Commerce Commission. Cf. 49 U. S. C. A. 308 (a) and (b).

We hold also that the fact that the plaintiff compensated Lilly, the consignee, for its loss does not excuse the defendant for its breach even though the bill of lading expressly

excepts from the carrier's liability loss due to the shipper's default as well as the Act of God. For the plaintiff made it plain in its accompanying letter that the payment was made for the preservation of customer relations and was not to be construed as an admission of liability on the part of the plaintiff. That letter also stipulated that acceptance of the plaintiff's check should constitute an assignment to the plaintiff of Lilly's claim against the defendant. Whether, by reason of this payment the plaintiff, as Lilly's assignee or otherwise, is entitled to recover from the defendant the amount of Lilly's loss, will be a question for the court below when it comes to determine the damages.

The defendant's cross-appeal is denied. The plaintiff's appeal is granted and the case is remanded for computation of damages flowing from the defendant's breach of warranty.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of September, one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,

Chief Judge,

Hon. Harrie B. Chase,
Hon. Carrol C. Hincks,

Circuit Judges.

Eastern Motor Express, Inc.,

Plaintiff-Appellant,

v.

A. Maschmeijer, Jr. Inc.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed as to the appeal of A. Maschmeijer, Jr. Inc., and that said judgment be and it hereby is reversed as to the appeal of Eastern Motor Express, Inc.; and action remanded in accordance with the opinion of this court; with costs to the plaintiff-appellant.

A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

October Term, 1957

No. 634

A. MASCHMEIJER, JR. INC.,
Petitioner,

against

EASTERN MOTOR EXPRESS, INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ZELBY & BURSTEIN,
Attorneys for Respondent,
160 Broadway,
New York 38, N. Y.

HERBERT BURSTEIN,
of Counsel.

HERBERT BURSTEIN,
ARTHUR LIBERSTEIN,
on the Brief.

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Argument:

The decision by the Court of Appeals for the Second Circuit does not constitute a first or novel construction of Section 20(11) of the Interstate Commerce Act; it does not suggest any of the criteria established by Rule 19 of the Revised Rules of this Court; the issues involved do not have that stamp of importance which warrant the exercise of certiorari jurisdiction by this Court 3

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IN THE

Supreme Court of the United States

October Term, 1957

No. 634

A. MASCHMEIJER, JR. INC.,
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EASTERN MOTOR EXPRESS, INC.,
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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Question Presented

Respondent respectfully submits that the petition fails to present any question for determination by this Honorable Court.[1] Petitioner's disregard of Rule 23 of the Revised Rules and the petition's plain lack of merit recommends denial of certiorari.

If the case presents any question (though one hardly meriting review) it is this:

> Does a shipper who delivers packaged goods for shipment warrant that the container, if not patently inadequate, is fit for the contemplated shipment so that the shipper is liable for damages which arise by reason of the violation of the warranty, and does the "packing rule" contained in the carrier's tariff recognize this principle of common law?

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[1] The duplicative motions for leave to file briefs *amicus curiae* serve only to becloud what is already obscure in the petition.

Statute Involved

Petitioner suggests that the decision by the Court of Appeals involves a novel and unorthodox construction of Section 20(11) of the Interstate Commerce Act (49 U. S. C. A. § 20(11)).[2] Section 20(11) of the Interstate Commerce Act (herein called the "Act") is not involved at all. Its impact, if any, is only tangential.

Contrary to Petitioner's contention, the decision of the Court below does not sanction a limitation of liability in contravention of Section 20(11) of the Act (Petition, at pp. 6-7, 27, 31, 32). There is no question of limitation of liability in this case. This is made evident by the text of the opinion by the Court below (Petition, Appendix at pp. 34 to 40).

The Packing Rule

The Packing Rule [Rule 5, subsection 8(a), of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9] provides in pertinent part:

> "Barrels * * * drums * * * must be made of wood * * * metal * * * or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

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[2] Section 20(11) is made applicable to motor common carriers by the provisions of Section 219 of the Interstate Commerce Act, Part II (49 U. S. C. A. § 319).

ARGUMENT

The decision by the Court of Appeals for the Second Circuit does not constitute a first or novel construction of Section 20(11) of the Interstate Commerce Act; it does not suggest any of the criteria established by Rule 19 of the Revised Rules of this Court; the issues involved do not have that stamp of importance which warrant the exercise of certiorari jurisdiction by this Court.

The damage and loss in this case were attributable to the act and default of the petitioner-shipper (Petition, Appendix, pp. 38, 40). The facts show that the petitioner shipped a liquid chemical in containers which were inherently defective; the latent defect was not observable by the carrier-respondent and the petitioner thereby violated the implied warranty of fitness for the contemplated shipment, recognized by the tariff "packing rule" (Petition, Appendix, pp. 37-38).

Petitioner misreads and, consequently, misunderstands the decision by the Court of Appeals in this case (Petition, Appendix, pp. 34 to 40). Petitioner also misconceives the nature of the case. This action does not turn on a defense by the respondent that its liability was limited. On the contrary, suit was instituted by the respondent-carrier to recover damages sustained because of the petitioner's breach of contract. The Court below pointed out that, at common law, a shipper who delivered packaged goods for shipment "impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment" (Petition, Appendix, at p. 37). The "packing rule" plainly describes the kind and quality of containers which will be accepted. In effect, therefore, the "packing rule" is a recognition of the common law principle that a carrier is under obligation to accept for shipment containers which "are not patently unfit" for shipment *i.e.*, meet the require-

ments of the "packing rule." However, where a carrier receives for shipment containers which are inherently defective or where the defect is latent and not observable by the carrier, the damage which results, by reason of the latent defect, renders the shipper liable for a breach of the implied warranty of fitness "for the contemplated shipment" (Petition, Appendix at p. 37).

Petitioner is in error, too, in assuming that Section 20(11) precludes suit by a carrier against a shipper—the very case at bar.[3]

The rights and liabilities of the parties were governed by the contract of carriage, namely, the bill of lading and the published tariff. A tariff provision (such as the "packing rule") is binding upon the carrier and shipper alike. *Chesapeake & Ohio Railway Company* v. *Martin & Porter*, 283 U. S. 209 (1931); *Davis* v. *Henderson*, 266 U. S. 92 (1924); *Louisville & Nashville R. Co.* v. *Chatters*, 279 U. S. 320, 331 (1929); *American Ry. Express Co.* v. *American Trust Co.*, 47 F. 2d 16 (C. A. 7, 1931), cert. den. 284 U. S. 629; *Boone* v. *United States*, 109 F. 2d 560, 562 (C. A. 6, 1940).

Contract law, and not principles of negligence, is the touchstone of the decision by the Court below. The contract of carriage fixed the liabilities of the parties. The

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[3] Section 20(11) does not enact a rule of absolute liability or impose upon a carrier the obligation of an insurer. It is elementary that a common carrier, subject to the provisions of the Act is responsible for loss or damage caused by it; it is not responsible for loss or damage caused by an Act of God, the public enemy, the inherent nature of the goods or the act or default of the shipper. *Adams Express Company* v. *Croninger*, 226 U. S. 491 (1913); *Chesapeake & Ohio Railway Company* v. *A. E. Thompson Manufacturing Company*, 270 U. S. 416 (1926); *Blytheville Cotton Oil Co.* v. *Kurn et al.*, 155 F. 2d 467 (C. A. 6, 1946); *Alabama & V. Ry. Co. et al.*, v. *American Cotton Oil Co.*, 249 Fed. 308 (C. A. 5, 1918); *Crump et al.* v. *Thompson*, 171 F. 2d 442 (C. A. 8, 1948); *Austin* v. *Seaboard Air Line R. Co.*, 188 F. 2d 239 (C. A. 5, 1951); *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595 (D. C. N. J., 1951)

"packing rule" was a reaffirmation of the carrier's duty to accept containers not patently unfit for shipment. When, as in the case at bar, damage or loss results because of a latent defect in the containers, the shipper is liable for a breach of an implied warranty of fitness and the liability "as bailor-warrantor is absolute" (Petition, Appendix, pp. 37-38).

The negligence concept of "due care", urged by petitioner (Petition, p. 17) "is irrelevant" (Petition, Appendix, pp. 37-38). Parenthetically, it may be noted that petitioner concedes that respondent proved that it had exercised due care in the handling of the drums (Petition, p. 30) and the Trial Court refused to find that respondent was guilty of contributory negligence (Petition, Appendix, p. 38).

Enchanted by a misplaced concept of negligence, petitioner steadfastly refuses or fails to recognize that the issue of negligence was not involved at all. This explains petitioner's incorrect contention that the decision in this case is in conflict with *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161 (C. A. 3, 1948).[4] In that case, it was claimed that the loss arose because the goods had been packed in allegedly defective barrels. The District Court had, in effect, instructed the jury that if the carrier had handled the goods properly ("ordinary, acceptable handling") then it was not liable. The Court of Appeals for the Third Circuit reversed, holding that "due care" became a material fact only if the jury, in the first instance, finds the existence of a latent defect or an excepted peril.

In the instant case, both the District Court and the Court of Appeals found that the damage or loss was caused by the latent defect of the drums in which the petitioner shipped the liquid chemical. Both courts expressly found that no acts of the respondent in the handling of the ship-

[4] Petitioner cites the decision at "161 F. 2d 161" (Petition, p. 2).

ment constituted contributory negligence which occasioned the damage.

Moreover, *Commodity Credit Corporation* v. *Norton*, *supra*, did not involve a claimed breach of a tariff rule or warranty. Hence, negligence was the key to that decision. In the case at bar, negligence "is not material on the issue of liability on the claim of a breach of implied warranty" (Petition, Appendix, pp. 37-38). In short, the decision by the Court of Appeals, in this case, disposes of a simple contract question, namely, the proven breach by the petitioner of an implied warranty of fitness.

Conclusion

The petition fails to suggest even the substance of a question calling for decision by this Honorable Court. There is no conflict of decisions to be settled and no important issue of statutory construction which requires resolution by this Honorable Court.

The petitioner's case is grounded on two illusory propositions: a statute which has only incidental pertinency to the issues involved and a conception of liability which finds no support in the statutory or decisional law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Respondent.

HERBERT BURSTEIN,
ARTHUR LIBERSTEIN,
on the Brief.

Dated, New York, January 31, 1958

MOTION FILED DEC 7 1957 LIBRARY
SUPREME COURT U S

No. 634

IN THE

Supreme Court of the United States

October Term, A. D. 1957

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, As An *Amicus Curiae.*

ROBERT N. BURCHMORE,
JOHN S. BURCHMORE,
Attorneys,

2106 Field Building,
Chicago 3, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1957

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, As An *Amicus Curiae.*

Now come John S. Burchmore and Robert N. Burchmore, as counsel for The National Industrial Traffic League, pursuant to paragraph 3 of Rule 42, and move the Court for leave to file as *amicus curiae* a brief which is submitted herewith, in support of the petition for writ of certiorari.

As grounds for this motion, petitioners submit the statement contained in the accompanying brief showing the interest of the League, the importance of the questions presented, and their relevancy to the disposition of the case.

Upon application to the parties for consent as a preliminary to this motion, the petitioner for a writ of certiorari has granted and respondent has refused consent, although consent was given by all parties to similar request made by the National Barrel & Drum Association, Inc.

It is submitted that the questions of law presented by the petition for a writ have not been and may not be adequately

presented by the parties for the reasons and to the extent shown in the accompanying brief. Therefore, if the Court grants certiorari, counsel further request leave to file an appropriate brief on the basic questions of law which this Court will consider in review of the decision of the Court of Appeals herein.

ROBERT N. BURCHMORE,
JOHN S. BURCHMORE,
Amicus Curiae.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building.
Chicago 3, Illinois.

December 5, 1957.

MOTION FILED DEC 7 1957
LIBRARY
SUPREME COURT, U S

No. 6341

IN THE

Supreme Court of the United States

October Term, A. D. 1957

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPORTING BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Amicus Curiae.

ROBERT N. BURCHMORE,
JOHN S. BURCHMORE,
Attorneys,

2106 Field Building,
Chicago 3, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1957

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

SUPPORTING BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Amicus Curiae.

The Interest of The National Industrial Traffic League.

The National Industrial Traffic League is a nationwide association of shippers of practically every kind and category of traffic transported by railroads and motor carriers or others. The organization is dedicated to the promotion of sound economic transportation.

The League has a continuing interest, broadly speaking, on behalf of its members in correct principles affecting the rights of shippers and the rights and duties of common carriers in respect of shipments of goods. It is concerned, therefore, with decisions of the courts, interpreting the statutes or defining the law as to respective liabilities of the carrier and of the consignor, where any loss, damage or injury occurs.

The membership of the League in recent annual convention, regarding this case as of very general public importance, authorized and directed intervention in proper

fashion to inform the Supreme Court of the gravity and widespread effect of the basic error of the Court of Appeals. The sole interest of the League is in a correct definition of the obligation of the consignor of a shipment to the common carrier and the absence of any absolute warranty such as laid down by the Court below.

The matter is argued in defendants' petition for writ of certiorari and in supporting briefs of other *amicus curiae* so fully that repetition in this brief should be saved.

I. The Common Carrier's Obligation.

Under their general obligation to receive and transport freight shipments, common carriers by highway and by railroad are specifically required by the terms of the Interstate Commerce Act, Sec. 20(11), to issue bills of lading in form which has been prescribed by the Interstate Commerce Commission and are liable for the full actual loss resulting from their negligence. By common law such carriers are, generally speaking and with certain exemptions, insurers of the goods. It is their right and privilege, however, to refuse acceptance of proffered shipments which are not properly packed, marked and prepared for transportation in accordance with established rules and common usage. The consignor has the duty of using proper containers, as reasonably required for the safe movement and delivery of the goods with reasonable care by the carrier; and if the packages or containers are patently deficient or faulty or defective, the carrier should refuse acceptance. These general statements are the commonly accepted practice and custom in present-day transportation by common carriage.

Specifically as to motor common carriers, the National Motor Freight Classification which provides the rules and regulations commonly governing the freight rate tariffs and the services, contains a so-called packing rule which requires that barrels, drums and so forth, in which ship-

ments (not inherently dangerous articles) are contained must be such "as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods".

II. The Decision of the Court of Appeals.

The Court of Appeals for the Second Circuit quotes the aforesaid packing rule; it briefly states the facts of this case; and the Court holds in substance and effect that the duty of the consignor is absolute, that defendant had breached an implied warranty existing under common law as recognized by the packing rule, so that the degree of care exercised by the consignor in packaging and preparation of the shipment is irrelevant. The Court applies its concept of the common law of bailments generally, distinguished (as we see it) from consideration of the common law governing carriers and shippers of freight in their respective rights and obligations.

The Court's opinion cites three cases bearing on its ruling of absolute duty of the consignor, with one of which its opinion is entirely inconsistent and the others have no apparent relation—event remotely—to the matter of common carrier obligation in the transportation of goods.

The Court of Appeals of New York in the cited case of *Hoisting Engine Sales Co., Inc.* v. *Hart*, 273 N.Y. 30, 142 N.E. 342, in considering the rights and obligations of bailors and bailees quoted an early English authority and held an implied warranty "that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it". Thus, when analyzed, the decision cited appears flatly inconsistent with the holding herein of breach of absolute warranty as to which "the degree of care exercised by the defendant is irrelevant".

The further citations *Overbury* v. *Platten*, 108 F. 2d 155, and *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612, do not appear to have the slightest application to the matter of

common carrier rights and liabilities respecting shipments, and any significance they may have for purposes of the present case completely escapes us.

Counsel for the League has not discovered any reported cases involving the law of common carriers which tend to support the theory and holding of the Court of Appeals.

On the other hand, there are many authorities, which, although not directly dealing with the present sort of controversy or precise question, are necessarily inconsistent with any holding of absolute warranty of a consignor concerning the quality of the container in which a shipment is offered and received by the common carrier.

III. Conflict with Decisions in Other Circuits.

The decision of the Appeals Court herein appears inconsistent with the decision of the Court of Appeals for the Third Circuit in *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161 (1948). That was simply an action for recovery of damages for loss of liquid goods in barrels which may have been defective. The Court holds the common carrier is strictly accountable under common law as an insurer and absolutely liable for loss, without regard to the exercise by the carrier of due care or of any lack of proof of negligence against the carrier. Clearly on the facts of the case the Court considered there was no implied or absolute warranty by the consignor.

The Circuit Court of Appeals for the Eighth Circuit in *Hover & Co.* v. *D. & R.G.W. R. Co.*, 17 F. 2d 56 (1927) considered the loss of goods through leakage in transit and held that in order to warrant a recovery by the carrier against the shipper for damages alleged to have been caused by consignor's failure to comply with regulations specifying the containers required to be used, it is necessary to prove that failure to fulfill such obligation caused the injury. This holding and the court's reasoning seem distinctly inconsistent with the theory of warranty by the consignor adopted by the Appeals Court in the present case.

IV. The Theory of Absolute Warranty Is Unique.

The decision of the Court of Appeals is attracting widespread attention of shippers and carriers as changing the common law rule and long-standing general practice and usage under which the shipper in tendering package goods represents in substance that the packages or containers are "of such strength as to afford safe handling, reasonable and proper protection of contents and against damage to other goods when transported with reasonable care and without negligent handling." The court goes so far as to hold that "the degree of care exercised by the defendant [consignor] is irrelevant." Questions of negligence of consignor or carrier and of actual fitness of the containers and packaging are issues of facts for the jury. We respectfully urge that there should be no basis in a final court decision for imposing against consignors a new and novel absolute warranty of the containers and packaging such as here pronounced by the Court of Appeals for the Second Circuit.

Counsel representing The National Industrial Traffic League now respectfully suggest and urge that the Court grant the writ of certiorari prayed for by defendant below in its petition filed December 3, 1957; and upon review the decision of the Court of Appeals should be reversed on the grounds set forth in defendant's petition.

Respectfully submitted,

ROBERT N. BURCHMORE,
JOHN S. BURCHMORE,
Amicus Curiae

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois.

December 5, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 634

A. MASCHMEIJER JR., INC.,

Petitioner,

v.

EASTERN MOTOR EXPRESS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE MANUFACTURING CHEMISTS' ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

NUEL D. BELNAP
One North LaSalle Street
Chicago 2, Illinois

KENNETH J. McAULIFFE
233 Broadway
New York 7, N. Y.
Attorneys

BELNAP, McAULIFFE & SPENCER
Of Counsel

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 634

A. MASCHMEIJER JR., INC.,

Petitioner,

v.

EASTERN MOTOR EXPRESS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE MANUFACTURING CHEMISTS' ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

Now come Nuel D. Belnap and Kenneth J. McAuliffe, as counsel for the Manufacturing Chemists' Association, Inc., pursuant to paragraph 3 of Rule 42, and move the Court for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari.

The Association is a non-profit corporation, with offices located at 1625 Eye Street, N. W., Washington, D. C. It is the national trade association of the chemical industry. Association members operate numerous plants and warehouses throughout the nation to and from which thousands of shipments of freight move daily by motor vehicle, railroad, and water. Many such shipments move in new and used drums or barrels. Shipments of chemicals by members of the Association constitute more than 90 percent of the total inter city chemical traffic in the United States.

The Association, on behalf of its members, has a vital interest in the law concerning the respective rights and liabilities of the shipper of freight and the common carrier employed to deliver the freight, in respect of claims for loss or damage to freight while in course of transportation.

The decision of the court below, *Eastern Motor Express, Inc.*, v. *A. Maschmeijer Jr., Inc.*, 247 F. 2d 826, holds that a shipper delivering packaged goods to a common carrier for shipment "impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment," and that, with exceptions not pertinent, the duty of the shipper, "as bailor-warrantor, is absolute." If this ruling were to govern the disposition of claims for damage to freight shipped by members of the Association, common carriers in possession of the freight being transported would be relieved from the payment of many thousands of dollars annually which, under a correct interpretation of the law, would be due from such carriers.

RESPONDENT REFUSES CONSENT.

Upon application to the parties for consent as a preliminary to this motion, the petitioner granted written consent to the Association, but respondent refused such consent.

BASIS FOR MOTION

Counsel for the Association have read the petition for certiorari, and the brief filed as *amicus curiae* on behalf of the National Barrel and Drum Association, Inc., and do not seek leave to repeat the arguments advanced by counsel in those documents.

Both documents allege that the decision in the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161, (1948). However, it is believed that further analysis of the nature and extent of the conflicts between these two decisions would contribute materially to an adequate presentation to the Court, and would be relevant to the disposition of the petition for writ of certiorari. If leave to file a brief is granted the Association, the brief will be directed to that question of law.

Wherefore, counsel for the Manufacturing Chemists' Association, Inc., respectfully requests that leave be granted for the filing of a brief as *amicus curiae*.

Respectfully submitted,

NUEL D. BELNAP
KENNETH J. MCAULIFFE

December 10th, 1957.

Certificate of Service.

I, Nuel D. Belnap, attorney for The Manufacturing Chemists' Association, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of December, 1957, I served copies of the foregoing document upon the several parties hereto, as follows:

1. On the Eastern Motor Express, Inc., by mailing a copy with air-mail postage prepaid to Bernard Axler, (Zelby & Burstein) 135 Broadway, New York, N. Y.

2. On A. Maschmeijer Jr., Inc., by mailing a copy with air-mail postage prepaid to Jerome G. Greenspan, 169 William Street, New York, N. Y.

3. On The National Barrel & Drum Association, Inc., by mailing a copy with air-mail postage prepaid to Morris Hershson, 200 West 57th Street, New York, N. Y.

/s/ NUEL D. BELNAP

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MOTION FILED DEC 12 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 634

A. MASCHMEIJER JR., INC.,
Petitioner,

v.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPORTING BRIEF OF THE MANUFACTURING CHEMISTS' ASSOCIATION, INC., AMICUS CURIAE

NUEL D. BELNAP
One North LaSalle Street
Chicago 2, Illinois

KENNETH J. McAULIFFE
233 Broadway
New York 7, N. Y.
Attorneys

BELNAP, McAULIFFE & SPENCER
Of Counsel

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPORTING BRIEF OF THE MANUFACTURING CHEMISTS' ASSOCIATION, INC., AMICUS CURIAE

The Interest Of The Manufacturing Chemists' Association, Inc., As An Amicus Curiae

The interest of the Association is in the correct determination of the respective rights and liabilities of the shippers of freight in interstate commerce and of the common carriers employed to transport such freight, when there is a claim for loss or damage to the goods entailing a question of fact as to the existence of a latent defect in the container of the freight.

The Association is a non-profit corporation, with offices located at 1625 Eye Street, N. W., Washington, D. C. Its members ship more than 90 percent of all chemical

traffic moving in interstate commerce. They operate numerous plants and warehouses located throughout the country and daily make numerous shipments of freight by common carriers in interstate commerce, including many shipments packaged in new and used barrels and drums.

The case arose in an action for damages by the respondent common carrier by motor vehicle against the petitioning shipper. The damages were alleged to have resulted from the leakage of two drums of a liquid chemical, methyl phenyl acetate, which constituted a part of an interstate shipment of thirty drums. Evidence was offered before the trial court that the two drums contained latent defects which could not be ascertained by any practicable method prior to shipment. Respondent sought to attribute the damage to the existence of such latent defects. After trial without a jury, the trial judge granted motions to dismiss the complaint, 141 F. Supp. 477.

On appeal, the court below reversed, 247 F. 2d 826, holding that under the common law:

> . . . a shipper in delivering packaged goods for shipment impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment. * * * the degree of care exercised by the defendant is irrelevant, for the duty of the defendant as bailor-warrantor is absolute.

The Association earnestly supports the various contentions made in the petition for certiorari. As stated in the motion for leave to file this brief, however, the purpose of the brief is not to argue those questions, but to bring out with particularity the nature and extent of the conflicts between the decision in the court below, and a decision of the Court of Appeals for the Third Circuit on the same matter.

ARGUMENT.

The decision in the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in Commodity Credit Corp. v. Norton, 167 F. 2d 161, (1948).

Community Credit Corporation v. *Norton*, 167 F. 2d 141, 3rd Circuit, 1948, involved an action by a shipper to recover against a rail carrier for loss of castor seed oil which, while in transit, had leaked out of recoopered and second-hand barrels. The appeal turned upon the same questions here presented, *i.e.*, the duties and liabilities of carrier and shipper where loss in transit is allegedly occasioned by a latent defect in the container. The lower Court had entered judgment on a jury verdict against the plaintiff and the question was:

> . . . whether the trial judge erred in his charge to the jury on the nature and extent of the liability of the defendant. (page 162)

It was held that the trial judge did so err and in the accompanying analysis four principles directly pertinent to the issues herein were enunciated.

The first principle is that a mere finding of "no observable defect" in a container when tendered to the carrier does not absolve the carrier of an insurer's liability. The trial court had charged the jury as follows:

> *If you find that there was the ordinary, acceptable handling in the shipment in the transfers of these various railroads, and if you find that there was no observable defect, then you will apply to those facts, if you so determine, the rule which I have outlined, and there would seem to the Court to be no legal responsibility on the part of the defendant company.* (163) (Italics as in report)

Speaking of this charge, the Circuit Court stated as follows:

> The error in the charge, we think, is brought into sharp relief by the italics. The learned trial judge instructed the jury that "rough handling" or "ordinary acceptable handling" would make a difference in the result of the case where there was "no observable defect" in the shipment upon receipt by the carrier. That is not the law. (page 164)

What the Third Circuit states is "not the law" in the *Norton* case, the Second Circuit in this case holds to be the law, as seen from the following excerpt from the holding of the court below:

> . . . a shipper in delivering packaged goods for shipment impliedly warrants [absolutely] that the containers, if *not patently inadequate*, are fit for the contemplated shipment. (Emphasis added)

The italicized words are the equivalent of "no observable defect", and the "absolute warranty", according to the court below, renders the shipper liable subject *only* to the qualification that the container is "not patently inadequate".

The second principle of the *Norton* case is related to the first. It is that only an affirmative finding that a latent defect existed can operate to diminish a carrier's liability from insurer to that of mere responsibility for negligence. Speaking of that portion of the trial court's charge to the jury quoted in italics above, the Circuit Court in the *Norton* case stated:

> As the cases already cited plainly establish, the carrier is responsible without regard to the exercise of due care, even though the damage or loss be occasioned by the independent act of third persons. See *United States* v. *Morgan*, 1850, 11 How. 154, 162, 52 U.S. 154, 162, 13 L. Ed. 643. The manner of handling the cargo, therefore, would be entirely irrelevant except in the event of an affirmative finding by the jury of the existence of a latent defect . . . (pages 164-165)

The decision of the trial court in the instant case may be searched in vain for such an affirmative finding. The position of the court below as to this matter is best revealed in the following passage:

> In this case, the undisputed facts imperatively required a finding that the defendant had breached an implied warranty . . .

The only facts which properly could be called "undisputed" are (1) that the drums did fracture, and (2) that the contents did leak. The court below expressly disagreed with the trial court's finding that no warranty existed to provide a drum that "shall *never* leak". The holding of the court below is that an absolute warranty exists which is violated *per se* by the fact of leakage, whether or not an affirmative finding of the existence of a latent defect is possible.

The third principle for which the *Norton* case stands was not stated in such direct terms as the first two but is of special importance here insofar as it is flatly contradicted by the holding of the court below. The rule is that a latent defect, where affirmatively found, must be shown to have "caused the loss" complained of in order to relieve the carrier of an insurer's liability. The Circuit Court in the *Norton* case found as follows:

> . . . the learned trial judge properly stated what the general liability of the defendant is. However, we believe that the quoted portion of the charge manifests error in the *application* of the basic principles announced.
>
> The error in the charge, we think, is brought into sharp relief by the italics. (page 164, emphasis supplied)

The error in "application" indicated by the portion of the trial judge's charge italicized in the report (page 163) has already been quoted and discussed above. The portion of

the trial judge's charge held by the Circuit Court to have "properly stated what the general liability of the defendant is" is reported by the Circuit Court as follows:

> Early in the charge, the jury was instructed that a common carrier is an insurer "except in such a case where, as asserted here, the goods were shipped in containers which seemed to be, to reasonable observation proper, but which contained defects which were not observable, latent defects, *which defects caused the loss.*" (page 163, emphasis supplied)

The holding of the court below in the instant case is plainly contrary to this statement of the law. The court below found that there is an implied warranty by the shipper that containers for packaged goods delivered to a common carrier are:

> . . . fit for the use for which the bailment is made at least as against latent unfitness. . . .

and that:

> . . . the duty of the defendant, as bailor-warrantor is absolute.

In that view of the matter, any latent defect found to exist in the container necessarily results in judgment against the shipper whether or not there is a finding that the latent defect proximately caused the loss or damage.

That the third principle of the *Norton* case is irreconcilably in conflict with the holding of the court below is easily demonstrated:

Assume that a latent defect is found to exist in a freight container at a point thereon which fractured while the container was in the course of transportation; and further, that there is convincing evidence that a common carrier employee dropped that same container some five feet off the tail gate of a truck, and that the fracture in the container occurred at the point of impact. Clearly the *Norton*

case rule is that the negligent handling of the container not the latent defect "caused the loss" and the carrier is, therefore, liable as an insurer. Under the decision of the court below, however, the shipper would be held liable for the breach of an absolute implied warranty that the container was not subject to any latent unfitness. The Association urges that the law on this subject as set forth in the *Norton* opinion of the Third Circuit is sound, and that the contrary opinion of the court below is erroneous.

It should be noted further that there was no finding of fact before the court below that any latent unfitness "caused the loss". Instead, the trial judge, sitting without a jury, found that "there was no proof that the drums were in need of repair or weakened or otherwise deteriorated prior to shipment;" and that "aside from the specifications, [previously discussed in his opinion] plaintiff has made no case for recovery against defendant on any theory of negligence."

The fourth principle for which the *Norton* case stands is that even where a latent defect is affirmatively found to exist, the carrier is nonetheless held to the standard of ordinary care and is liable for its negligent acts. This is made plain from the following passage in the *Norton* case:

> The manner of handling the cargo, therefore, would be entirely irrelevant except in the event of an affirmative finding by the jury of the existence of a latent defect, or unless the damage or loss is brought within another excepted peril, which would give rise to the application of the rule of negligence.

Stated in other words, the carrier's "manner of handling the cargo" *is* relevant where a latent defect is affirmatively shown to have existed. In that circumstance, the Court in the *Norton* case holds that the carrier's liability is reduced to responsibility for negligent conduct.

Under the conclusion of the court below, any "application of the rule of negligence" would be precluded, where the existence of a latent defect in a container is found to be an "excepted peril". That is to say, the rule of the case below is, in effect, that the shipper impliedly warrants absolutely against any latent unfitness of the container and that evidence of negligence of either shipper or carrier would be irrelevant in the determination of the case. That rule is in conflict with the rule of the *Norton* case. Compare *McNeil Higgins Co.* v. *Old Dominion S.S. Co.*, 235 Fed. 854 (7th Cir., 1916) and *Chicago & E. I. R. Co.* v. *Collins Produce Co.*, 235 Fed. 857, (7th Cir., 1916); aff'd 249 U.S. 186).

CONCLUSION.

Based upon the foregoing, the Association prays that the Court grant the petition for writ of certiorari to review the decision of the court below.

Respectfully submitted,

NUEL D. BELNAP
KENNETH J. MCAULIFFE
Amicus Curiae

December, 1957

Certificate of Service.

I, Nuel D. Belnap, attorney for The Manufacturing Chemists' Association, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of December, 1957, I served copies of the foregoing document upon the several parties hereto, as follows:

1. On the Eastern Motor Express, Inc., by mailing a copy with air-mail postage prepaid to Bernard Axler, (Zelby & Burstein) 135 Broadway, New York, N. Y.

2. On A. Maschmeijer Jr., Inc., by mailing a copy with air-mail postage prepaid to Jerome G. Greenspan, 169 William Street, New York, N. Y.

3. On The National Barrel & Drum Association, Inc., by mailing a copy with air-mail postage prepaid to Morris Hershson, 200 West 57th Street, New York, N. Y.

/s/ NUEL D. BELNAP

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In the

Supreme Court of the United States

October Term, 1957

No. 634

A. MASCHMEIJER, JR., INC.,
Petitioner,

v.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF SOUTHERN TEXTILE CHEMICAL MANUFACTURERS' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

JAMES B. CRAIGHILL
Attorney

CRAIGHILL, RENDLEMAN & KENNEDY
609-613 Law Building
Charlotte 2, North Carolina
Of Counsel

In the

Supreme Court of the United States

October Term, 1957

No. 634

A. MASCHMEIJER, JR., INC.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF SOUTHERN TEXTILE CHEMICAL MANUFACTURERS' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

Southern Textile Chemical Manufacturers' Association, hereinafter sometimes called "Southern Textile", respectfully moves, in accordance with Paragraph 3 of Rule 42, for leave to file a brief as amicus curiae in support of the petition for writ of certiorari in the above entitled case.

Southern Textile is a non-profit association consisting of approximately thirty-three members who are engaged in the business of manufacturing and shipping various chem-

icals in barrels and drums in the southeastern states, particularly in the states of North Carolina and South Carolina. One of the primary objects of Southern Textile is to promote and protect the interests and rights of its members and to serve as a vehicle for common action to accomplish that purpose. The decision of the Court of Appeals in this case, in effect, makes shippers of liquid products in barrels and drums absoluately liable for any leakage, or damage resulting therefrom, due to any latent defect in the container notwithstanding the exercise of the highest degree of care on the part of the shipper, and substantially relieves carriers from the burden of proof formerly on them with respect to any negligence on their part in the handling of the shipments while in their possession.

Southern Textile is thus vitally interested in obtaining a review of this decision, the results of which, if it is not reversed, will be seriously detrimental to the business of its members.

This motion is being made because the respondent, through its counsel, has refused to consent to the filing of such a brief by Southern Textile.

By appearing as amicus curiae and participating in this matter, Southern Textile seeks to emphasize to the court the vital interest of its members and others similarly situated in the decision in question.

Facts and questions of law which Southern Textile desires to discuss in its brief include the following:

1. The tremendous potential impact of the decision in question on the particular businesses of the members of Southern Textile, who are required by circumstances to rely primarily on motor carrier transportation.

2. Whether the decision of the court below is contrary to the public interest in that:

(a) It inequitably shifts the obligation of proof from the carrier, who has the right to inspect the containers at the time it receives them, to the shipper, who has no means of knowing what happens to the containers after delivery to the carrier.

(b) It imposes an absolute liability and responsibility on the shipper, notwithstanding the fact that the shipper may have exercised not only reasonable care under the circumstances but even the highest degree of care possible.

Southern Textile thus seeks to show that its members, in addition to the other interested persons who are already participating, are vitally interested in the decision, and wishes to discuss in its brief matters of peculiar concern to its members which the movant believes have not been adequately treated elsewhere.

Respectfully submitted,

JAMES B. CRAIGHILL
Attorney for Southern Textile Chemical Manufacturers' Association

CRAIGHILL, RENDLEMAN & KENNEDY
609 Law Building
Charlotte, North Carolina
Of Counsel

January 14, 1958

CERTIFICATE OF SERVICE

I, James B. Craighill, attorney for Southern Textile Chemical Manufacturers' Association, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of January, 1958, I served copies of the foregoing motion and of the accompanying Supporting Brief of said Association upon the several parties hereto, as follows:

1. On the Eastern Motor Express, Inc., by mailing a copy with air-mail postage prepaid to Bernard Axler (Zelby & Burstein), 135 Broadway, New York, N. Y.

2. On A. Maschmeijer, Jr., Inc., by mailing a copy with air-mail postage prepaid to Jerome G. Greenspan, 169 William Street, New York, N. Y.

3. On The National Barrel & Drum Association, Inc., by mailing a copy with air-mail postage prepaid to Morris Hershson, 200 West 57th Street, New York, N. Y.

4. On The Manufacturing Chemists' Association, Inc., by mailing a copy with air-mail postage prepaid to Nuel D. Belnap, One North LaSalle Street, Chicago 2, Illinois.

(s) JAMES B. CRAIGHILL

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—against—

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPORTING BRIEF OF THE NATIONAL BARREL & DRUM ASSOCIATION, INC., *Amicus Curiae*

NATIONAL BARREL & DRUM ASSOCIATION, INC.

MORRIS HERSHSON,
Attorney,
200 West 57th Street,
New York, N. Y.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPORTING BRIEF OF THE NATIONAL BARREL & DRUM ASSOCIATION, INC., *Amicus Curiae*

Preliminary Statement

Consent for the filing of this brief *Amicus Curiae* was granted by respondent and petitioner; stipulation of consent is being submitted simultaneously herewith.

In respectfully submitting this brief, the National Barrel & Drum Association, Inc., hereinafter called the "Association", is interested exclusively in obtaining a correct determination of the question whether, under the common law, shippers are charged with an implied, absolute warranty concerning the fitness of the containers transported by common carrier; and a proper interpretation of a common carrier's obligation as an insurer.

I

The "Association" is a non-stock, non-profit corporation, organized and existing under the laws of the State of New York, with offices located at 1145—19th Street, N. W., Washington, D. C., and is the national trade association of the reconditioned wooden barrel and steel drum industry, representing reconditioners of and dealers in wooden barrels and steel drums. Reconditioning plants of the members are located throughout the United States.

II

The sole interest of the "Association" in this proceeding is the effect of the decision below, insofar as it is *stare decisis*, upon the steel drum industry, as well as upon the customers of the steel drum industry, who are the shippers of material packaged in drums. Steel drums are used in interstate commerce for the transportation of a large percentage of the liquid and semi-liquid products of the industrial economy of the United States. Among the industries using steel drums are the petroleum industry, the chemicals industry, the paint, varnish and lacquer industry, the lard and shortening industry, the glue and adhesives industry, etc. According to figures compiled by the Bureau of the Census of the United States Department of Commerce, in 1956 there were 18,326,000 55-gallon drums manufactured, and, on a sampling survey, at least 22,353,000 55-gallon drums reconditioned. The industry estimates that probably 60,000,000 steel drums of that size alone are used annually in interstate commerce.

It is obvious, therefore, that any decision which drastically changes the liabilities and responsibilities of ship-

pers and carriers of material packaged in steel drums is of grave consequence to the entire economy—not only to the shipper-companies directly involved, which number tens of thousands throughout the country, but also, indirectly, to their customers and to the ultimate consumer. The business of each shipper of petroleum, chemicals, paints, lards, adhesives, etc., which in the aggregate represents billions of dollars, is seriously affected. This decision is, consequently, of the deepest concern to the business of each of the "Association's" members, amounting, in the aggregate, to tens of millions of dollars.

III

The question sought to be determined is the legal liability of a shipper to a motor carrier for damages resulting from the leakage of liquid freight contained within steel drums. The issues include:

(a) The question whether, under the common law, the shipper is charged with an implied *absolute* warranty concerning the quality of the container which the shipper offers for transportation to a common carrier.

(b) The obligations of a common carrier as an insurer.

IV

The facts, briefly, are as follows:

The respondent, a common carrier by motor vehicle in interstate commerce, was offered for transportation by the petitioner, a manufacturer of various chemical products, thirty (30) drums of a chemical known as methyl phenyl acetate. The respondent inspected the drums, found them

in good condition, accepted the shipment, and issued a "clean bill of lading" to the petitioner therefor.

In the course of the transportation of this shipment, respondent claims that two of the drums leaked, and caused damage to other material in respondent's truck, as well as to the truck itself. Respondent sued on several theories—1–negligence, 2–breach of express warranty, and 3–breach of implied warranty.

The express warranty is contained in the certificate attached to the bill of lading, which certificate in effect warrants that the drum is in compliance with I C C regulations for the shipment of the particular product. This warranty was held inapplicable by the Trial Court which held that it only applies to the shipment of "dangerous" products, and the material in this case was not in that category. The shipment was actually governed by Rule 5, subsection 8(a) of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9 which provides as follows:

> "Barrels • • • drums • • • must be made of wood • • • metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

The petitioner submitted evidence that it had used due care in the packaging, that it had selected good drums, and that it had complied with the above stated Packing Rule by supplying drums which afforded "reasonable and proper protection of contents • • • ". After a trial without a jury, the District Court granted motions to dismiss the complaint, based upon a finding of fact that the petitioner had submitted drums to the respondent which, in all respects,

complied with the governing rules adopted in the National Motor Freight Classification. On appeal to the United States Court of Appeals, the Court reversed the decision, basing its reversal solely on a ruling that because the drums had leaked, the petitioner

> "had breached an implied warranty existing under the common law, as recognized by the Packing Rule",

and that this implied warranty is *absolute*. From this decision the petitioner is petitioning for writ of certiorari to this Court.

V

The decision of the Court of Appeals that a shipper of steel drums is liable *absolutely* for damages to other freight resulting from leakage because of an implied warranty will, if upheld, adversely affect all manufacturers of new drums, all reconditioners of used drums, and all shippers of material packaged in steel drums, whether such drums are new, reconditioned or un-reconditioned. Shippers of containers of all other kinds, steel pails, wooden barrels, fibre drums, etc., totaling hundreds of millions, will be equally affected.

Prior to this decision by the Court of Appeals, there was ample precedent that a common carrier was the insurer of merchandise received by it, the only exceptions to such liability being Acts of God, force majeure, loss due to inherent nature of goods, *or the fault of the shipper*. The decision of the Court of Appeals in the instant case completely reverses this long-standing rule, because under the decision, the shipper is liable *whether or not he is at fault*. The decision states:

> "As a defense to the plaintiff's claim of breached warranty, the degree of care exercised by the defendant is irrelevant, for—with exceptions not pertinent here—the duty of the defendant as bailor-warrantor is absolute".

Therefore, the Court of Appeals in effect held that whether a shipper uses a new drum, or a reconditioned drum, or a used drum which has not been reconditioned, or whether the shipper is at "fault", is "irrelevant". Such a ruling relieves the carrier of his responsibility as an insurer, and shifts the responsibility, *absolutely*, to the shipper.

ARGUMENT

I.

A ruling that a shipper of goods impliedly, absolutely warrants that a container is fit for transport, is necessarily inconsistent with, and a reversal of the longstanding common law rule dictating the obligations of the common carrier.

A. At common law the common carrier has the duties of an insurer.

Several theories have been advanced concerning the origin of the doctrine that common carriers are insurers of goods. That it arose from the special duty of one engaged in a public occupation to warrant the fitness of his performance is perhaps the most correct historically.

In *Coggs* v. *Bernard*, 2 Ld Raym 909 (1703), a case involving the liability of a gratuitous carrier Lord Holt, by dictum, announced the principle that common carriers are bound "to carry goods against all events but acts of God

and enemies of the King". Although Lord Holt meant to include a larger variety of occasions within the exemption, acts of God, the later cases recognized only the acts of God as are known today. Eighty-two years later, Lord Mansfield, in *Foward* v. *Pittard*, 1 T. R. 27 (1785), held a faultless common carrier liable for loss of goods, giving birth to the universally accepted concept that "a carrier is in the nature of an insurer". This statement, as adopted by all the English and American courts, placed upon the common carrier all the duties of an insurer but not all its rights.

What Lord Mansfield meant by the statement, "a carrier is in the nature of an insurer", is made manifest by the United States Supreme Court in *Hall and Long* v. *The Railroad Cos.*, 60 U. S. 367, 13 Wall (1871). The court granted to an insurance company recovery from a common carrier for the loss paid by the insurance company to the insured shipper whose goods had been destroyed while being transported by the common carrier. The court said:

> "A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, *and even greater*, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to cession on the principles peculiar to the contract of insurance; and when loss occurs, unless caused by an Act of God, or of a public enemy, *he is always in fault. The law raises a conclusive presumption of his misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact he has consented by his contract to be dealt with as if he were not so.*" (Emphasis supplied)

It is firmly established that the common carrier's obligations are at least as great as those of an insurer.

B. The common carrier in this case is liable for the loss of goods, which loss does not fall within any of the exceptions.

In order for a common carrier to escape from the liability created by this rule of law, it must prove that the loss or damage was caused by an event falling within the exceptions to the rule.

An act of God, or the act of a public enemy were the two exceptions enumerated by *Coggs* v. *Bernard*, *supra*.

Two additional exceptions have evolved from the decisions of the courts over the years. The common carrier is not responsible where either the inherent nature or vice of the goods themselves, or the faulty acts of the shipper, give rise to the loss.

The *Coggs* v. *Bernard*, *supra*, exceptions are clearly inapplicable in this case.

The third exception concerns itself primarily with perishable goods. Our litigation does not deal with perishable goods, and the District Court found no inherent vice in the nature of methyl phenyl acetate. It found, further, that the drums used were the best available type. The carrier, therefore, has the burden of proving that the loss was caused by the fault of the shipper, the final exception provided by the common law.

The carrier proceeded to trial on three theories.

First it claimed that the shipper was guilty of a tortious fault, that it was negligent. But the District Court found

that the shipper employed the reasonable care required by using the strongest type of containers after having adequately tested them for fitness.

Secondly, the carrier contended that the shipper was guilty of a breach of an express warranty, i.e. a contractual fault whereby the carrier was injured by reliance upon a certification that the goods being shipped were "Harmless Chemicals". The District Court found that there was no reliance on the description in the carrier's determination to carry the load, because the carrier knew that the certificate was unnecessary; and in fact methyl phenyl acetate was accurately described by that phrase. The second express warranty upon which the carrier claims to have relied was that said certificate contained in the bill of lading stated that the shipment met with the rules and regulations of the Interstate Commerce Commission. The District Court found no breach of this express warranty, and found further that the certificate was inapplicable, because the product was not dangerous or harmful. The Court of Appeals found no breach of any express warranty.

The third theory contended was that the shipper breached an implied warranty contained in the express provisions of the bill of lading that the goods were fit for transportation. The District Court properly found no implied warranty on the part of the shipper, reasoning that the bill of lading is a restatement of the common law which never included implied warranties, but the Court of Appeals reversed, holding that at common law a shipper impliedly, absolutely warrants the fitness of the containers. *Any support of the Court of Appeals' theory is inconsistent with the fourth exception to the general rule.* Liability for breach of an implied, absolute warranty does not mean

that the shipper was at fault. The implied warranty is a legal fiction utilized to place the loss on one party where neither was tortiously or contractually at fault, but where fortuitous circumstances caused the loss or damage. To be harmonious with the common law doctrine of the common carrier's liability as extending at least as far as that of an insurer, the loss, not having been caused by any of the four exceptions, must be placed on the common carrier regardless of the fact that it was faultless. *Hall and Long v. The Railroad Cos., supra.*

II.

There is no source of authority for holding the shipper of goods via common carriers to absolutely warrant impliedly that a container is fit for transport.

The Interstate Commerce Act, Part I, 49 U. S. C. Section 20 (11) provides for the liability of interstate common carriers for loss, damage, or injury to shippers' goods. Part II of this Act, 49 U. S. C. Section 319 makes this section applicable to motor carriers. This statute imposes upon the carrier the same duties as those which are imposed by the common law. *Missouri R. Co. v. Harriman*, 227 U. S. 657, 33 S. Ct. 397, 57 L. Ed. 690 (1913).

The relationship between the shipper and carrier and the responsibilities of each are fixed in the agreement made and contained in the bill of lading in accordance with the tariffs and regulations published by the Interstate Commerce Commission. *American Ry. Express Co. v. Amer. Trust Co.*, 47 F. 2nd 16 (C. C. A. 7) (1931); *L. & N. Ry. Co. v. Chatters*, 279 U. S. 329, 49 S. Ct. 329 (1928). As the District Court said, the bill of lading is a restatement of

the common law; and held that there was no implied warranty in this case at common law. The Court of Appeals, reversing, held "that the defendant (shipper) had breached an implied warranty (of fitness) existing under the common law as recognized by the Packing Rule". It further stated that "the duty of the defendant, as bailor-warrantor is absolute".

This cannot have been the common law recognized by the Packing Rule, for there has never been such a doctrine set forth at common law applying to common carriers.

The rule of implied warranty was developed to relocate the loss in sales cases where the doctrine of *caveat emptor* prevailed. Previously the courts held that the loss due to a defect in the purchased chattel would fall on the buyer where the seller did not expressly warrant the article's fitness. Even where the seller innocently misrepresented the article to be something of much greater value in his advertisement, invoice, and bill of sale, the court would not place the liability on the seller. *Seixas* v. *Wood*, 2 Caines 48, 2 Am. Dec. 215 (1804). Eighty years later in *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, 3 S. Ct. 537 (1884) the court adopted the legal fiction of implied warranty in order to retain the long established principle of *caveat emptor*, but to alleviate the hardship on the buyer where the seller, a builder in that case, was in a better position to know of the product's defects. Most courts were reluctant to apply this legal fiction establishing absolute liability. When it was applied it was usually limited to sales cases.

The Uniform Sales Act Section 15 contains a provision for the implied warranty of fitness for a particular pur-

pose. New Jersey, the state in which the present transaction took place, has adopted the Uniform Sales Act, and in Section 46:30-21 New Jersey Statutes provide:

> "Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> (1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods be reasonably fit for such purpose."

The act in restating the law as it developed in many jurisdictions does so negatively. It manifests the courts' policy in limiting absolute liability, stating that there is *no* implied warranty *except* in certain situations.

The basis for such a warranty is the buyer's reliance on the seller's skill and judgment. It is presumed that the buyer is a novice and is not capable of determining the fitness of the goods. In this case the common carrier handles drums of this type regularly, and is in a position to ascertain the fitness of the drum as well as the shipper. In *Dunbar Bros.* v. *Consolidated Iron & Steel Mfg. Co.*, 23 F. 2nd 416 (C. C. A. 2 1928), the court held that the buyer of iron springs from the manufacturer had the opportunity for reasonable examination of the samples, and should have discovered defects, latent or otherwise and, therefore, could not rely on an implied warranty of fitness theory. The court reasoned that the buyer, being a manufacturer

of locks, and concerned with the problem of obtaining proper springs, could not assert that it relied on the skill and judgment of the seller, even though the seller was the manufacturer of the springs.

Today in many jurisdictions the restaurateur is held to absolutely warrant that his food is fit for human consumption. *Friend* v. *Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918); *Temple* v. *Keeler*, 238 N. Y. 344, 144 N. E. 635, 35 A. L. R. 928 (1924). But many jurisdictions hold that there is no warranty implied, and require that the negligence of the restaurateur be proved. They hold this on the theory that no sale takes place, but only a service is supplied. In *F. W. Woolworth Co.* v. *Wilson*, 74 F. 2nd 439 (C. C. A. 5 1939) the court said "* * * and that by long settled law there is a duty on the furnisher to use skill and care in procuring the materials, in preparing and serving them, for failure of which damages may be recovered; but no warranty is to be implied imposing liability irrespective of negligence."

Recently the Court of Appeals of New York, in *Perlmutter* v. *Beth David Hospital*, 308 N. Y. 100, 123 N. E. 2nd 792 (1954) denied recovery to a patient where the hospital furnished her with impure blood during a transfusion, distinguishing this from a sale of food situation by holding that this was a contract for services, and not a sale as contemplated by the Uniform Sales Act. The court refused to draw an analogy from the sales cases, and would not recognize any implied warranty.

Decisions such as these make manifest the policy that the courts use restraint in applying the doctrine of absolute liability, and are reluctant to extend the implied warranty fiction beyond sales cases.

In the area of bailments for hire, liability is sometimes based upon implied warranty of fitness. The Court of Appeals in the instant case, drew an analogy from the bailment for hire situation, and applied it to the shipper-common carrier relationship. The bailment for hire is a transfer of possession of a chattel in exchange for rental and contemplated return of chattel to the owner. The courts reason that because the bailee relies on the supplier-bailor, that the chattel is fit for the purpose bailed, the bailor impliedly warrants its fitness.

According to Williston, there was considerable support for the view that the seller did not warrant against latent defects. *I. Williston, Sales* Sections 233, 237 (rev. ed. 1948). The Uniform Sales Act changed that view as to sales, "*but it persists in bailment cases.*" *Implied Warranties of Quality in Non-Sales Cases, E. Allan Farnsworth*, 57 Col. L. Rev. 653, 657.

The leading bailment case, cited by the Court of Appeals as holding the bailor to an implied warranty of fitness, where the chattel apparently had a latent defect, is *Hoisting Engine Sales Co.* v. *Hart*, 237 N. Y. 30, 142 N. E. 343 (1923). In this instance the bailor's derrick fractured and caused property damage while the bailee was using it for the purpose set forth in the contract of bailment. The cases which the court cites as authority are all sales cases; in addition to which it quotes from Halisbury's Laws of England, Vol. 1 Section 1117:

> "• • • his (the bailor's) delivery of it to the hirer amounts to an implied warranty that the chattel is in fact fit and suitable for that purpose *as reasonable skill and care can make it.*" (Emphasis supplied)

The court continues, "This is the rule to be applied to the facts of this case."

If this were the rule which should have been applied as stating the common law, then there is no absolute warranty of fitness even in bailment cases. The warranty under this rule is for fitness "*as reasonable skill and care can make it.*" This is a test used in determining whether a defendant is liable under the theory of negligence.

California has quoted the rule of common law applicable in bailment-for-hire circumstances in two recent cases.

> "A bailor's implied warranty of fitness does not make him an insurer against all personal injuries suffered from the defective operation of the bailed chattel. *He impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it was hired.*" (Emphasis supplied)

McNeal v. Greenberg, 40 Cal. 2nd 740, 255 P 2nd 810 (1953); *Sproul v. Cuddy*, 131 Cal. Ap. 2nd 85, 280 P 2nd 158 (1955).

The pivotal question which the California court asks is, did the bailor discharge his duty of exercising reasonable care? If the answer is yes, he is not negligent and, therefore, not liable for any damage caused by the defect, be it property or personal injury.

New Jersey is the locus of the transaction in the instant case. In *Brandt v. Asarnow*, 7 N. J. Misc. 803, 147 A 233, affd. 106 N. J. L. 559, 150 A. 917 (1929) the court said:

> "• • • the established rule in such cases (bailments for hire) is that *the bailor is required to use due care* to have the article *reasonably* fit for the purpose for which it was bailed." (Emphasis supplied)

Since the bill of lading is a restatement of the common law of carrier liability, and the issue of whether it has been complied with is a federal question to be determined by federal law, *Chesapeake & O. Ry.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931), and since there is no federal common law, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938), the federal courts must decide whether an analogy to bailments for hire is applicable to shipper-carrier relationships.

Wherein lies the resemblance of a common carrier to a bailee for hire?

The common carrier is an insurer of goods, and no negligence need be proven for it to be liable. The bailee is not an insurer. He is liable only if his negligence causes the loss or damage. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 62 S. Ct. 156 (1941); *Schiavone-Bonomo Corp.* v. *Buffalo Barge Towing Corp.*, 132 F. 2nd 766 (C. C. A. 2 1942); *Franklin* v. *Airport Grills, Inc.*, 21 N. J. Sup. 409, 91 A 2nd 348 (1952).

In common carrier litigation, the rule is that the burden of proof lies on the common carrier to exonerate itself once the shipper shows that his goods were damaged or lost. *Clark* v. *Barnwell*, 53 U. S. 272, 13 L. Ed. 985 (1851). The bailee, on the other hand, does not have the burden of proof, and it is incumbent upon the bailor to show that the bailee was negligent. *Commercial Molasses Corp.* v. *Tank Barge Corp., supra; The Ponce*, 67 F. Supp. 725 (1946), aff'd. 160 F. 2nd 107.

The bailee, in hiring the chattel, pays the bailor for its use. The common carrier does not pay the shipper for use of the goods shipped, but rather receives a fee for the services which it provides.

In fact the sole similarity is that the common carrier takes possession of the shipper's goods and contemplates transporting them to another party. This is not a sufficient criterion for drawing an analogy in lieu of the many legal differences and consequences.

Assuming that analytically an analogy can be drawn, are the reasons for adopting absolute liability valid in our case? The task of proving negligence on the part of the shipper would not be an impossible one. The carrier, for example, would only have to show that the shipper's inspection tests are inadequate to meet the due care standard of a reasonable man. Evidence to this effect was introduced by the carrier, but it failed to meet its burden, the District Court ruling that the standard was reasonable.

Justice in no way can require that an insurer of goods be compensated merely because damage has been done by the shipper's goods. The theory of implied warranty is to relocate the loss where neither party is at fault. But the law has presumptively distributed the loss beforehand by charging the common carrier with the obligations of an insurer.

The Court of Appeals, in holding that "* * * the duty of the defendant, as bailor-warrantor is absolute", cited two cases as authority for this proposition, completely new to shipper-carrier relationships. The first, *Overbury* v. *Platten*, 108 F. 2nd 155, (C. C. A. 2 1939), is not in point. This case holds that pledgees of stock can attach it for another debt owed to them by the pledgor, and have a valid lien on the stock.

The second case cited, *Mulvaney* v. *King Paint Mfg. Co.*, 256 F. 612 (C. C. A. 2 1919) involved a libel for a breach

of charter. The plaintiff chartered a barge to the defendant who subchartered it to a third person. A disaster damaged the barge and the court found that the defendant was not at fault. Plaintiff proceeded under the theory of breach of an express covenant to return the barge in the same condition as received. The court said that an express covenant to keep safely requires the bailee to keep the barge as a reasonable man would, and as in the common law the bailee is not an insurer for the thing bailed, therefore, should it be destroyed without his fault, he is not liable.

The court added that the parties may covenant that the bailee be an insurer. This implies that if the bailee were an insurer, then he would be liable irrespective of fault. This proposition would support the shipper in our case, for the common carrier is an insurer at common law.

There are no common carrier cases supporting the theory proposed by the Court of Appeals.

In *W. A. Hover & Co.* v. *Denver R. G. W. R. Co.*, 17 F. 2nd 881 (C. C. A. 8 1927), the common carrier sued the shipper for damage caused by a fire resulting from the leakage of carbon bisulphide from its containers. The carrier complained that the shipper had failed to comply with the Interstate Commerce Commission's regulations requiring that the liquid be stored in heavier gauged containers. The court, in holding that the regulation was unauthorized, and that, therefore, there was no negligence *per se*, said by way of dictum, that had the shipper complied with the regulation, still the railroad could not recover, for it was the carrier's burden to prove that it was the shipper's failure to fulfill his obligations which caused

the cans to leak. The court nowhere mentions an implied warranty on the part of the shipper.

The case of *National Distillers Products Corp.* v. *Companhia Nacional de Navegaco,* 167 F. Supp. 65 (1952) is in point. Here a consignee sued a ship owner and a railroad for loss of wine due to leakage from the pipes in which the wine was shipped. The ship owner conceded liability for the loss from Portugal to Pennsylvania, Pa. The pipes which had leaked were coopered or reconditioned by the consignee, so that the leakage stopped before the railroad loaded the pipes into freight cars bound for New York. The railroad issued a clean bill of lading. The court held that the common carrier which had accepted wine for shipment could not escape liability on the ground that the containers were inadequate to withstand normal rail carriage without loss.

Commodity Credit Corp. v. *Norton,* 167 F. 2nd 161 (C. C. A. 3 1948) speaks only of negligence when discussing the carrier's defense, where a shipper sued a common carrier for loss occasioned by leakage of castor oil from its containers. Here again there is no mention of implied warranty on the part of the shipper.

Where then lies the source of the implied warranty fiction as applied to common carriers? The only authority applying this theory to cases involving common carriers is the English doctrine involving the shipment of dangerous goods, where the carrier is not notified that the goods are dangerous.

The proposition originates in *Brass* v. *Maitland,* 119 Eng. L. R. 940 (1856) holding the shipper to an implied

warranty of fitness. This was not a common carrier case, but later common carrier cases followed its reasoning. Here the shipper failed to give a private carrier notice of the dangerous article, chloride of lime. He had told them it was bleaching powder. *Bamfield* v. *Goole*, 2 K. B. 94 (1910) held that a shipper who delivers goods in fact dangerous to a common carrier, without notice of the danger, impliedly warrants that the goods are fit for transportation. In that case the shipper did not notify the carrier of the fact that it was shipping ferro-silicon, a dangerous chemical, but instead called it "general cargo".

Grt. No. Rwy. v. *L. E. P. Trans. & Depos. Ltd.*, 2 K. B. 742 (1922) held that forwarding agents who deliver goods in fact dangerous (perhydrol) to a common carrier without notice of the danger (the goods were described as oxygen water, a harmless chemical) are liable on the theory of implied warranty.

These cases as synthesized, state the law of England to be that the shipper of goods which are not known by the carrier to be dangerous, impliedly warrants that the goods are such as may be safely carried, and are not dangerous. If in fact they are dangerous, and damage results, the shipper is absolutely liable. This applies to a common carrier under a duty to carry, whether the duty is determined by statute or common law.

There is no reference to non-dangerous goods in the English rule. Further, even with reference to dangerous goods, there is no implied warranty if the carrier is aware that the goods are dangerous, and has been so notified by the shipper.

In our case the District Court found as a fact that the goods were accurately described as methyl phenyl acetate, that m.p.a. is not listed in the Motor Carrier Explosives & Dangerous Articles Tariff of the Interstate Commerce Commission, and that they were not dangerous.

The District Judge recognized the English rule by footnoting his statement that he failed to find "any basis for the implication that the containers shall never leak in carriage", by adding that he excepts dangerous articles from this rule.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Court of Appeals erred in finding that at common law a shipper impliedly, absolutely warrants to the common carrier that a container is fit for transportation.

It is the contention of the National Barrel & Drum Association, Inc. that the common carrier is liable as an insurer, unless one of the four exceptions is applicable, and that the shipper is liable only when he is at fault.

It is urged that a review of this decision is vital on a national scale, to all common carriers, all shippers of products in any type of container, and, indirectly, to all industrial and ultimate consumers of such products.

It is further urged that the failure to reverse the decision of the Court of Appeals will result in substantial harm to container manufacturers, container reconditioners, shippers of all products packaged in containers, as well as the general public. We therefore pray that this Honorable

Court grant the petition for writ of certiorari to review the decision of the Court below.

Respectfully submitted,

NATIONAL BARREL & DRUM ASSOCIATION, INC.

By MORRIS HERSHSON, *President*
An Attorney at Law of the State of New York, and the District Court of the United States for the Southern District of New York

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New York, N. Y.

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IN THE

Supreme Court of the United States

October Term 1957

Docket No. 634

A. MASCHMEIJER JR., INC.,
Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE*

NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.
By LOUIS SILVER, Attorney,
880 Bergen Avenue,
Jersey City, N. J.

Of Counsel:
JOHN M. MILLER, Attorney,
1424 Sixteenth Street, N.W.,
Washington, D. C.

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IN THE

Supreme Court of the United States

October Term 1957

Docket No. 634

A. MASCHMEIJER JR., INC.,

Petitioner,

vs.

EASTERN MOTOR EXPRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE*

Interest of the National Freight Claim Council of the American Trucking Associations, Inc., as *Amicus Curiae*

Consent was obtained from the attorneys for the respective parties to permit the National Freight Claims Council of the American Trucking Associations, Inc., hereinafter called the Council, to file a brief *Amicus* as set forth on page 33 *infra*.

The National Freight Claim Council of the American Trucking Associations, Inc., is a division of the American Trucking Associations, Inc., which is a non-stock, non-profit corporation organized and existing under the laws of the

District of Columbia, with offices located at 1424 Sixteenth Street, N.W., Washington, D. C., and is the national trade association of the trucking industry, representing all types of motor carriers, for hire and private.

Broadly, at the trial level before the District Court, and the subsequent appeal before the Court of Appeals, the issue for determination was the legal liability of a shipper to a motor carrier for damages resulting from the leakage of liquid freight contained within used metal drums fractured by "(metal) fatigue."

Participating in the tariff provisions applicable to the case, and under the governing rules adopted in the National Motor Freight Classification pursuant to Part II of the Interstate Commerce Act of 1935, 49 U. S. C. Sec. 319 (1935), as amended (1942), are five thousand interstate motor common carriers. The conclusion of the District Court, 141 F. Supp. 477 (1956), that there is no liability upon a shipper of used drums for damage to other freight resulting from leakage caused by "metal fatigue" was of serious consequence to all common carriers compelled, because of their legal obligation, to accept such shipments. *Chesapeake & Ohio Ry. Co. v. O'Gara, King & Co.*, 144 Ky. 561, 139 S. W. 803 (1911); *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, U. S. D. C. Oregon (1953).

It is the position of the Council that the legal errors by the District Court have been corrected by the opinion of the Court of Appeals; that the holding by the Court of Appeals of a breach of implied warranty by the shipper under the undisputed facts is a valuable, legally correct decision, amply supported by precedent; and that any attack thereon is largely factual, or based upon misconception of the application of legal principle. The sole interest of the Council as *Amicus Curiae* here, is the preservation of the clarification of law applicable to its rules and tariffs as achieved by the decision of the Court of Appeals.

The Statutes and Regulations Governing the Transaction

It is noted that the statutes and regulations pertaining to the instant controversy have been omitted from the Petitioner's brief. They are herewith respectfully set forth as essential to understanding and resolution of the issues:

The Dangerous Article Certification

The authority for the bill of lading certification is found in 49 Code of Federal Regulations (Sec. 77.819) page 263. Pursuant thereto the rules and regulations have been republished by the motor common carrier industry in Agent C. F. Jackson's MF-ICC No. 16-Motor Carrier Explosives and Dangerous Articles Tariff No. 5, Sec. 819:

> "819 Certification of packages. Except as provided herein below, no motor carrier may accept for transportation or transport any class A or class B explosive, blasting caps or electric blasting caps in any quantity, or any dangerous article requiring label as prescribed by these regulations, unless it be certified to him by shipper's name inserted on the label or by the following certificate over the written or stamped facsimile signature of the shipper or his duly authorized agent in the lower left-hand corner of the manifest, memorandum receipt, bill of lading, shipping order, shipping paper, or other memorandum:
>
> > This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission."

The language prescribed appeared on the printed bill of lading issued in the instant controversy. Its efficacy was argued before the trial court and the Court of Appeals. The District Court judge made rulings thereon. The Court of Appeals decided on other grounds and did not rule on this provision. The "Packing Rule" is clearly separate and must be carefully distinguished.

The "Packing Rule"

Its authority originates from Section 316 (b) of the Interstate Commerce Act, Part II, 49 U. S. C., 49 Stat. 558 (1935) which provides:

> "It shall be the duty of every common carrier of property by motor vehicle * * * to establish classifications and just and reasonable regulations and practices relating thereto and to the manner and method of * * * packing * * * property for transportation, the facilities for transportation and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

In compliance with this statute the National Motor Freight Classification No. 9 was issued and filed with the Interstate Commerce Commission (MF-ICC No. 17) by the American Trucking Associations, Inc. Tariff Bureau (C. F. Jackson, agent) on September 10, 1947, effective October 25, 1947. It was stipulated at the trial that, among others, the shipment was subject to this tariff. As quoted by the Court below, Rule No. 5, of this tariff provides as follows:

> "8(a) Barrels * * * drums * * * must be made of wood * * * metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

Question Presented

Should Certiorari be granted where:

(1) the petitioner's arguments are essentially issues of fact which, in substance, have been concurrently decided adversely to him by two courts below;

(2) the Court of Appeals did not err in holding on undisputed facts that the defendant-shipper-bailor was liable to the plaintiff-motor carrier for breach of implied warranty in accordance with the "Packing Rule" where the shipper's second hand drums, containing liquid freight,

failed from a latent defect termed fatigue, and damaged the carrier's equipment and other freight;

(3) the issues are neither novel nor unsettled;

(4) the Court of Appeals' decision is not in conflict with any other decision; and

(5) there is no miscarriage of justice.

Statement of Facts

While the facts have been restated in the opinion of the Court of Appeals, *Eastern Motor Express, Inc.* v. *A. Maschmeijer, Jr., Inc.*, 247 F. 2d 826 (1957), and in the opinion of the District Court, 141 F. Supp. 447 (1956), and presumably by the parties hereto, as well as other interested persons, there is one fact that has been underemphasized, or in some instances altogether omitted, that is of such great significance to this proceeding that it is herewith set forth:

The sole cause for the failure of the used drums, inspected and selected by the shipper, and the resultant damage to other freight concurrently in possession of the motor carrier and to the motor carrier's equipment, was a latent defect termed (metal) "fatigue." This uncontroverted finding was set up in the opinion of Judge Conger by way of many questions and answers. Further reference is made to it by him as follows:

> "Further, since Dr. Brown stated that the cause of the fractures was metal fatigue * * *"

The Court of Appeals accepted the finding of fact as contained in the questions and answers by utilizing the conclusion of "latent unfitness" of the containers. Judge Conger described Dr. B. Floyd Brown as a "metallurgist of undoubted quality". Dr. Brown's conclusions (without quotations) are restated, incorporating some of the questions which were summarily answered:

Fatigue is caused by accumulation of damage to the metal as a result of repeated applications of stress above some limit in the case of steel. The longer a drum is used the more likely it is to rupture or break. The break or fracture in the two drums in question were hairline cracks, the width of which were too small to be measurable in ordinary terms, but essentially constituted a one dimensional fracture. It is impossible to see the weakened condition of the containers because in a used drum it may be hidden by paint or otherwise. The cause of the fracture was fatigue alone.

A shipper of commodities ordinarily shipped in drums, knowing its previous history, usage, weight, etc. is in a better position to determine whether a drum is more likely to fracture because of metal fatigue than a shipper who does not know the previous history, and one who acquires drums from many sources, without knowing its history, is assuming a greater risk. A drum, used, with rerolled chime, or reconditioned, is more likely to fracture than a new drum.

The fractures or breaks in the drums were not caused by any particular application of unusual force at the time the drums broke, but they had been used so often and so hard that they had been subjected to many previous stresses, with the result that these drums just wore out from usage. There were no signs of impact with any outside instrumentality at the point of the break. Visual inspection of the bottom of the drum would not, by itself, be sufficient basis to indicate that it was so weakened that it would leak in transportation.

Summary of Argument

1. Petitioner's basic argument is the factual issue of negligence, or contributory negligence, based upon a failure to secure the cargo or to use skids. The proof is alleged

to be shown by photographs taken two years after the loss. These contentions have been previously rejected by the trial court, as well as the Court of Appeals.

2. The carrier is under a statutory duty to accept freight and could not by ordinary observation know that the drums would fracture from metal fatigue. Therefore, he could not take an exception thereto. The "Dangerous Articles" certification on the bill of lading refers to the express warranty in the complaint. It is not related to the "Packing Rule" which is found in the stipulated tariff. The cause for the damage was a latent defect, one of the excepted causes under the bill of lading, which exculpated the carrier from liability. The shipper is a bailor and in accordance with the plain meaning of the "Packing Rule" (or even if interpretation is given thereto) it was the shipper's duty and implied promise to provide containers which afforded safe handling, reasonable and proper protection of contents, and protection against damage to other goods. The shipper-bailor failed to comply with his implied warranty in accordance with all the terms of the agreement, including the "Packing Rule."

3. Logically and legally subdivided, each issue has had ample judicial consideration. The implication of a "clean receipt" when there are defects in the container, and the subsequent liability of the shipper, has been discussed in the old texts. Implied warranty is also an established theory. The (so called) "dangerous article" cases hold the shipper liable for breach of implied warranty on the theory of failure to comply with authorized carrier regulations. This is analogous to the theory here.

4. Careful scutiny of the cases asserted to be in conflict show that they merely reiterate the same principles as applied to the instant litigation, and favor the carrier's position.

5. The shipper's contentions are inequitable in that his conduct must result in damage to other innocent people. He is not deterred from taking affirmative measures to minimize the conditions producing the loss.

ARGUMENT

I

The petitioner's arguments are essentially issues of fact which, in substance, have been concurrently decided adversely to him by the two Courts below.

Regardless of the joint findings of both Courts previously hearing this matter (*supra*, pp. 5 and 6) that the sole cause of the damage was metal fatigue, the Petitioner in factual opposition thereto urges negligence, or contributory negligence on the part of the plaintiff motor carrier. This contention was briefed and argued both at the trial level and before the Court of Appeals. The negligence asserted is based upon (a) the failure to secure and brace the cargo and (b) an alleged duty to use skids for the other general merchandise which was damaged by the leakage. These same allegations are also the basis for the argument of contributory negligence.

The proof of the alleged negligence is based upon certain photos purporting to show that the drums were "out of shape and banged up." Petitioner's brief before the Court of Appeals admits on page 19:

> "The pictures of the drums which were taken in 1951, *2 years after the loss*, indicate indicate abuse and rough treatment in transit which as Maschmeijer contended was the actual cause for leakage." (Emphasis supplied.)

The photos were in evidence in the District Court. Nevertheless, Judge Conger found (64a):

"That the defendant (shipper) has failed to prove that it was negligent not to brace and block the drums." (Parentheses supplied.)

With the same photographs before it, the Court of Appeals approved of the finding of the District Judge (38 App. to Petition). It proceeded to dispose of the residual contention concerning the alleged necessity for the use of skids and pallets. In presently reasserting the argument and dissatisfaction with the Court of Appeals' ruling concerning the use of skids and pallets, the explanation by counsel at the oral argument before the Court of Appeals is pertinent. His theory in this regard, as explained to the Court, was that if the miscellaneous freight were raised from floor level, that the leakage from the drums would not have affected it unless the liquid from the defective drums reached the height of the skids, or approximately four to six inches. The obviously erroneous inference is that leakage from defective drums is a normal incident of transportation within the contemplation of the parties engaged in shipping and transportation. Moreover, (38 App. to Petition) the Court of Appeals recognized that the damages caused by the pervasive odor of the chemical would not have been avoided by the use of skids and pallets.

The factual issue of negligence, as shown by the photos, appears to be the main argument of the Petitioner in seeking Certiorari. Each of the five points of argument, as well as part of the reasons listed for granting the Writ, depends substantially upon the factual contention of negligence, rough handling and bad condition of the drums as shown by the photos taken two years after the incident complained of. The Petitioner's brief refers to this issue on pages 5, 7, 8, 10, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26 and 30. In addition, these same photographs, already twice passed upon, are being submitted to this Court for their evidentiary value as essential to proving the crux of the Petitioner's case. It is respectfully urged that the back-

bone of the Petition is contrary to the test indicated by *Houston Oil Company of Texas et al.* v. *Goodrich et al.*, 245 U. S. 440 (1918):

> "The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result. 226 Fed. Rep. 434." Also see *Southern Power Company* v. *North Carolina Public Service Company et al.*, 263 U. S. 508 (1924).

The point is conclusively shown by tracing the issue through its previous course in litigation. Before the District Court in a "Memorandum After Trial" the legal issue of the liability of the shipper was virtually admitted, with the exception of the affirmative arguments concerning the condition of the drums as shown by the photos upon delivery to the carrier, an obligation to brace, block and secure the freight, as well as to use skids. Other arguments are here abandoned. Even though Petitioner was successful (on other grounds, *i.e.* a purported interpretation of the "Packing Rule") in the District Court, he cross appealed to the Court of Appeals. The Petitioner's brief argued the probative value of the photos in Point I, commencing on page 9. Further, error was urged in regard to contributory negligence. Again it was asserted that this consisted of a failure to brace, block and secure the load, and the failure to use skids and pallets, as well as other issues not raised here. Once more the photos were disposed of by the Court. The cross appeal was denied. As stated in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1948) page 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact

by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275; District of Columbia v. Pace, 320 U. S. 698; Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364; Baker v. Schofield, 243 U. S. 114, 118."

II

The Court of Appeals did not err in holding on undisputed facts that the defendant-shipper-bailor was liable to the plaintiff-motor carrier for breach of implied warranty in accordance with the "Packing Rule" where the shipper's second-hand drums, containing liquid freight, failed from a latent defect termed fatigue, and damaged the carrier's equipment and other freight.

The Court of Appeals' opinion succinctly speaks for itself. It is not anticipated by reason of this argument that improvement of the Circuit Court of Appeals' opinion will be achieved. Necessarily, the following arguments are mostly rebuttal of the erroneous legal application by the Petitioner or others interested.

a. Acceptance of Freight

A common carrier, either under or apart from statutory provisions, is under a duty to accept cargo and to transport it. This duty has been characterized as a "public office or trust". *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp. 475; U. S. D. C. Oregon (1953). There is no dispute that the respondent-carrier accepted the freight and gave a receipt therefor without exception in accordance with its statutory duty.

The carrier's duty was solely to make ordinary observation. The bill of lading thereupon acknowledges receipt:

> "The property described * * * in *apparent* good order, except as noted (contents and condition of

contents of packages unknown)." (Emphasis supplied.) Also see *Modern Tool Corp.* v. *Pa. R. Co.*, 100 F. Supp. 595 U. S. D. C., N. J. (1951).

The obligation of disproving the *prima facie* evidence thus established was rebutted by the proof that the drums were loaded by the shipper (3a), that the defective condition of the drums was externally concealed, and that the fractures were the result of metal fatigue. *Teischman* v. *Penn. R.R. Co.*, 230 F. 2d 787, 791 (C. C. A. 3rd) (1956); *York Co.* v. *Central R.R.*, 70 U. S. 107 (1865); *Nelson et al.* v. *Woodruff et al.*, 66 U. S. 156 (1861). These authorities clearly reject any further inferences (mostly factual) from the clean bill of lading as argued in Petitioner's Point III, page 16 and Point IV, page 20. Clearly, the carrier could not have taken exception or rejected the freight under the circumstances of this case.

b. "Dangerous Article" Certification

The authority and language for the Dangerous Article certification found on the face of the bill of lading has been set forth on page 3, *supra*. Judge Conger decided that there was no reliance on this certification based upon his interpretation of the nature of methyl phenol acetate, *i.e.* that it was not a dangerous commodity. This finding related only to the theory of express warranty in the complaint. It was not in any way related by him to the "Packing Rule" which has been set forth on page 4, *supra*. It is now urged that the trial judge "found as a fact that there was failure of proof of reliance" (p. 4 Petitioner's brief.) The primary purpose of the bill of lading certification is in regard to the criminal provisions of 18 U. S. C. Secs. 831-835 (1948). The certification is the basis for accountability for fraud. The provision is substantially distinguishable from the "Packing Rule" provision, as asserted by Petitioner. In the same manner, the argument raised that the implied warranty depended on the dangerous article certification is not valid. The shipper's liability stems from the entire agreement in effect.

The "Packing Rule", *supra* page 4, which was stipulated by the parties as being applicable (15a), is contained within the classification. It was not contained physically on the bill of lading before the Court. It was, nevertheless, part of the agreement between the parties. The tariff rules and regulations published by the carriers pursuant to the regulations of the Interstate Commerce Commission have the effect of law and cannot be added to, altered, amended or changed by oral agreement. The contract between the shipper and the carrier is made up not only of the bill of lading but of the bill of lading plus the tariffs, schedules, and other governing rules and regulations published by the carriers pursuant to the regulations of the Interstate Commerce Commission. *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453 (1931); *Mobile & O. R. Co.* v. *Jensen*, 162 Miss. 741, 139 So. 840 (1932). As set forth *supra* pages 3, 4, the filing of the classification with the Interstate Commerce Commission was notice to the shipper-petitioner of the rules and regulations concerning the manner of packing. As noted in *Bradley* v. *Lake Shore & M.S. Ry. Co.*, 129 N. Y. S. 1045, 1047 (1911):

> "that (the tariff provision) became the law of the case." (Parentheses supplied.)

Thus, as always, there was here a specific reliance upon the express provisions of the "Packing Rule" between shipper and carrier as part of the agreement between them. *Davis, Agent* v. *Henderson*, 266 U. S. 92 (1924). Such was the conclusion of the Court of Appeals, amply supported.

c. Defenses Under the Bill of Lading

In the instant case, the sole cause for the damage was the latent defect of the drums. This proven cause may be considered with the same result, either improper packing, which would constitute an act or default of the shipper, or inherent vice. Both are defenses by a motor carrier under the bill of lading. Defectiveness and unsuitability of the containers in which the commodity has been shipped has

long been recognized as squaring under the exceptions to the bill of lading. *Nelson* v. *Woodruff*, 66 U. S. 156 (1861); 13 C. J. S. (Sec. 79) 152; 13 C. J. S. (Sec. 78) 150.

The case *of Zerega et al.* v. *Poppe et al.*, 30 Fed. Cas. 932, Case No. 18,213 (1849) concerns itself with casks which were allegedly insufficient to bear the weight of oil in them. While the proof in that case was insufficient to prevail (latent defect was not proven), the principle of exculpation of the carrier from liability for excepted causes is set forth. As stated in *Boh Bros. Construction Co.* v. *Perry Heavy Haulers*, 72 F. Supp. 102, at 104 (1947) U. S. D. C. E. D. La. aff'd 166 F. 2d 719 (C. C. A. 5th) (1948).

> "In the absence of limitation by contract, a carriers common law liability for the safe carriage of goods is that of an insurer, except when the injury or damage to goods arises from certain excepted causes, namely, an Act of God or the public enemy, the inherent nature or vice of the goods themselves, and acts of the shipper. Within the last named exception fall such acts as the improper or faulty packing and preparation for shipment; and it may be stated as a general rule, subject to qualifications hereinafter noted, that, *when the loss or injury occurs by reason of the fact that the goods have been improperly or defectively packed, the carrier is relieved of liability.*" (Emphasis supplied.)

Having proven one of the defenses under the bill of lading, *i.e.*, latent defect, the motor carrier could not remain an insurer as asserted by the petitioner. Liability of a common carrier has been expressed as that of an insurer for loss or damage of goods in transit, with certain well defined exceptions. *United States* v. *Savage Truck Line*, 209 F. 2d 442 (C. C. A. 4th, 1953). It has also correctly been stated conversely that the carrier is *not* an insurer because of the exceptions under the bill of lading. *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595, U. S. D. C., N. J. (1951).

d. Shipper's Agreement as Bailor

It is readily conceded that a motor carrier is not an ordinary bailee. He has rather been classified as *locatio operis mercium vehendarum*—the hired carriage of a thing. The shipper is, of course, a bailor, and the law of bailment is particularly applicable to him. As such, and contrary to the arguments advanced, the defenses under 49 U. S. C. 20(11) are not at all pertinent to a shipper-bailor. The shipper's rights, duties and liabilities must be determined from the terms of the contract between the parties, whether express or implied. *Lebkeucher* v. *Penn. R.R.*, 97 N. J. L. 112 (1922) affirmed 98 N. J. L. 271 (1922). As stated therein:

> "Where there is an express contract the terms thereof control since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose and their express agreement will prevail against general principles of law applicable in the absence of such an agreement. 6 Corp. Jur. 1110, Sec. 42."

As it appears in *Insurance Co. of North America* v. *Elgin, Joliet & Eastern Ry. Co.*, 229 F. 2d 705 (C. C. A. 7th, 1956):

> "As said in 8 C. J. S., Bailments, Sec. 22, p. 255: 'The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement.'"

As previously shown, the agreement between the parties in the instant case incorporated by reference the

"Packing Rule". It is the terms of this tariff provision, rather than the test of "reasonable care" (as suggested by the Petitioner and others interested) that applies.

e. Application of Packing Rule

In regard to this rule the District Judge said:

> "But the regulations do not require a drum that shall never leak merely one affording *reasonable* protection, etc.,"

The Appellate Court corrected this error by reversal. Otherwise, it decided on "undisputed facts", accepting and embracing all the findings of fact by the District Court Judge. The Court of Appeals briefly stated:

> "We disagree with that interpretation."

The Court of Appeals recognized that the plain language of the "Packing Rule" did not require, in itself, any construction or interpretation whatsoever. In other words, on appeal there was no finding of uncertainty of meaning. Having determined that the meaning was clear and unambiguous, there was no need for any attempt at construction. *Penn. R. Co.* v. *Fox & London*, 93 F. 2d 669 (C. C. A. 2d), (1938); *Cohn-Hall-Marx* v. *Vanosdall*, 25 Ohio App. 360 157 N. E. 908 (1927).

Even close examination and legal interpretation does not change the results obtained by the Court of Appeals. The "Packing Rule", restated for convenience, provides:

> "8(a) Barrels • • • drums • • • must be made of wood • • • metal or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

The qualifying word "reasonable" appears solely in that portion of the rule requiring that drums must afford "reasonable and proper protection of contents." The conjunctive meaning of the words "and proper pro-

tection of contents'' must also be considered. Nor was safe handling possible. Likewise, the supplemental requirement following the word ''and''—that the drums must protect ''against damage to other goods'' cannot be ignored. The quoted rule actually requires that the drums must be of strength sufficient to afford a tri-fold function, namely:

1. Safe handling;

2. Reasonable and proper protection of contents;

3. Protection against damage to other goods.

At most, the requirement of ''reasonable protection'' is limited by the rule as applying to the second requisite, ''2'' above, *i.e.*, to the contents of the drum. The first requirement for ''safe handling'' and the third requirement that the drums must protect ''against damage to other goods'' are not qualified. They are absolute requirements and duties of the shipper.

In support of the conclusion that there must be compliance with all three parts of the ''Packing Rule'', the following authority is of assistance:

> ''The entire tariff must be visualized and effect given to every word, clause, and sentence, to the end that as said by the courts, the general and specific provisions in apparent contradiction may subsist together.'' *Swift & Co.* v. *Akron, C. & Y. Ry. Co.*, 220 ICC 778, 780 (1937); *Pillsbury Flour Mills Co.* v. *Gr. No. Ry. Co.*, 25 F. 2d 66 (C. C. A. 8th, 1928).

f. Liability of Shipper-Bailor

Thus, either from the plain meaning of the tariff provision, or from principles of construction, the result is the same. The residual question is the liability of the shipper-bailor to the motor carrier-plaintiff, as found in their agreement containing the ''Packing Rule'' as part of the contract in effect.

In accordance with the entire agreement, the Court of Appeals in considering the law applicable stated:

> "Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made, at least as against latent unfitness."

In support thereof it cited *Hoisting Engine Sales Co., Inc. v. Hall*, 237 N. Y. 30, 142 N. E. 342 (C. A., N. Y.) (affd. 1923). The proponents for the Petition for Certiorari have criticized the citation, but have overlooked the exposition of the basic law as set forth in the case, as follows:

> " 'All implied warranties, therefore, from their nature may attach to a written, as well as an unwritten contract of sale.' Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 146, 43 N. E. 422, 424 (C. C. A., N. Y., 1896).
>
> "By analogy there is an implied warranty in the hiring or bailment of certain kinds of property."

The application of the principle of implied warranty is protested by the Petitioner. It is also contended that this doctrine is new or restricted in its application. To the contrary, the *Law of Torts*, Second Edition, Prosser (1955) Sec. 83, page 496, states:

> "There are indications of a definite tendency to extend the strict liability of an implied warranty beyond cases involving the sale of goods. It frequently is said that the bailor of a chattel for hire impliedly warrants its fitness for the bailee's use. In some cases this apparently has meant no more than an obligation to use reasonable care, but *in others the bailor clearly is held liable without negligence. A similar warranty has been found in the case of a shipper delivering goods to a carrier,* and a landlord leasing a furnished apartment for a short term. • • • " (Emphasis supplied.)

The term implied warranty is defined in *Black's Law Dictionary*, Fourth Edition (1951) at page 1759:

> "Implied Warranty. When the law derives it by implication or inference from the nature of the

> transaction or the relative situation or circumstances of the parties. Great Atlantic & Pacific Tea Co. v. Walker, Tex. Civ. App., 104, S. W. 2d 627, 632."

In other words, the implied warranty referred to by the Court of Appeals is the declaration or promise by the shipper that the drums, in accordance with the "Packing Rule", would be in good enough condition for transportation to permit safe handling, reasonable and proper protection of contents, and protection against damage to other goods. In tendering the used drums, containing a liquid chemical, methyl phenol acetate, to the motor carrier for transportation, the shipper impliedly warranted that the drums met with the requirement of the "Packing Rule". The fact that the drums fractured, leaked, and caused damage to other freight, by itself, proves that the wornout drums did not have strength sufficient to afford safe handling, reasonable and proper protection to contents, and most conclusively that they did not protect "against damage to other goods", in accordance with the rule quoted. It is thus that the Court concluded that:

> "The 'Packing Rule' (Rule 5 subsection 8 (a)) makes it plain that a shipper by motor carrier is within that rule. (The implied warranty of the bailor against latent unfitness)". (Parentheses supplied.)

g. Shipper's Affirmative Defenses

The Court of Appeals found the issue of contributory negligence "irrelevant", as not applicable to a breach of implied warranty. Such is shown by *Challis* v. *Hartloff, et. al.*, 136 Kans. 823, 18 P. 2d 199 (1933), in regard to this defense, wherein the Supreme Court of Kansas stated:

> "The doctrine of contributory negligence rests in the law of tort as applied to negligence, and is governed by the principles peculiarly applicable to that branch of jurisprudence. 45 C. J. 941".

The Court of Appeals' statement is dictum pertaining to the factual affirmative defense of contributory negligence. In so stating, the Court was taking into consideration all of its previous conclusions—the holding of the case and its findings of fact. Its full significance is:

> After consideration and acceptance of the facts and evidence adduced before the District Court; and having determined that the "Packing Rule" was part of the agreement between the parties; and it being clear that pursuant thereto the shipper-bailor impliedly promised that he would pack the liquid freight in absolute compliance therewith; and it appearing that there was no negligence by the carrier who exercised due care; but rather a failure by the shipper to perform his promise in that damage was caused solely from metal fatigue, a latent defect of the container—that as a further conclusion:
>
> The shipper had breached his implied duty as bailor-warrantor in accordance with the obligation of his contract.

Under these circumstances, the defense of contributory negligence was not applicable. With this explanation, all arguments against this portion of the opinion must fall.

Nor is the criticism of *Overbury* v. *Platten*, 108 F. 2d 155 (C. C. A. 2d) (1939); *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2d) (1919) (utilized by the Court of Appeals in support of the conclusion of the preceding paragraph) justified. In the case of *Overbury* v. *Platten* (*supra*) the decision was rendered by Justice Learned Hand. Justice Clark, the now presiding justice for the Circuit Court of Appeals, 2nd Circuit, was then a member of the Court. His familiarity with the principles therein no doubt motivated citing this case, not as dispositive of the entire situation, but merely for the fundamental principle of law therein contained, when it was stated:

> "* * * it is of course true that, with certain exceptions not here important, an obligor (corresponding to the shipper-bailor in the instant case) taxes the risk of whatever will prevent his performance, but that does not include prevention by the obligee (corresponding to the motor carrier-bailee in the instant case) himself." (Parentheses supplied.)

The analogy is simply that a shipper, as bailor, is absolutely liable for any risk which prevents his performance, although the carrier-bailee may have the same responsibility dependent upon the facts of the case. The converse perspective also produces the same result. Similarly, the application of *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612 (C. C. A. 2d, 1919), has been entirely missed, or utterly garbled in argument. Even if, as contended, this case refers to the possibility of a bailee making a covenant to constitute him an insurer, the same possibility is true to the bailor. Such is obviously the application to the shipper-bailor in the instant case when it was stated in *Mulvaney* v. *King Paint Mfg. Co., supra*, that:

> "It is well settled that if the party, by his contract, charge himself with an obligation possible to be performed he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him, Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762."

In short, the shipper-bailor here did not, by the proofs, exculpate himself from liability in accordance with the exceptions quoted in the ordinary law of bailment. Further, the citation confirms that the contract embracing his liability is controlling and must be enforced according to its terms. The terms of the instant agreement have been discussed, and by them "the duty of the defendant, as bailor-warrantor, is absolute", as stated by the Circuit Court of Appeals. He, therefore, was absolutely liable in accordance with the law of bailments.

III

The issues are neither novel nor unsettled.

Many complicated arguments have been asserted in favor of certiorari. The rebuttal (Point II, page 11 *et seq.*) has necessarily been lengthy. While there may not be any one case which combines all of the separate questions raised, each logical subdivision has been before the courts time and time again. The whole is no greater than the sum of its parts.

The issues have been given ample prior consideration. For example, it would appear that this entire legal controversy was anticipated and answered in *Hutchinson, Carriers* (3rd Edition) (1906) Vol. 1 at page 169:

> "Sec. 163. (& 125.) Recitals as to condition of goods, how far conclusive. It has likewise been determined that the usual recital in such instruments that the goods are in good order has reference only to the external appearance, either of the goods themselves or of the packages into which they are put. Hence, it is always competent for the carrier to show, notwithstanding such an admission, that the loss or damage was caused by the spoiling of the goods from natural decay before they could be delivered, *or that they had wasted from defects in the vessels in which they were contained*, or that it arose from the unskillful or improper manner in which they were packed, or that they had deteriorated or were damaged at the time they were delivered to him. He is not presumed to know the quality of the goods, nor can he refuse to carry them, whatever it may be, if they are fit to carry and are the kind he usually carries, nor can he, ordinarily, know the condition of the contents of the packages or vessels brought to him for transportation. It cannot be supposed, therefore, that he intends by such a recital to admit more than that the goods are in an apparently fit condition for shipment. And such is the construction which these

words have received. *If the damage has proceeded from any such 'hidden cause, whether naturally inherent in the commodity itself or arising from the carelessness of the shipper, the loss must be borne by him.'* The carrier is not then in fault, *nor is his acknowledgement that they have been received in good order or condition a warranty or insurance against such an event.* But if it can be shown that the loss might have been avoided by the use of the proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, he will still be liable." (emphasis supplied)

The old, classic case of *Lister* v. *Lancashire & Yorkshire Ry.*, 1 K. B. 878, 72 L. J. K. B. 385 (1903) also applies. In that case the shipper employed the defendant as a common carrier to transport an engine from his yard to a neighborhood station. The engine was on wheels and had shafts attached by which it could be drawn. En route, one of the shafts broke and the engine was upset and damaged. The shaft was rotten at the point where it broke, but this was not known either to the shipper or carrier, and could not have been discovered by any ordinary examination. In other words, it was a latent defect. The arguments accepted by the Trial Court and reversed on appeal are remarkably similar to the petitioner's contentions in the instant controversy. As stated in the reversing opinion:

"The learned County Court judge was of opinion that common carriers were not only liable for negligence, but were insurers; that the fact that there was a concealed defect in the shaft prevented there having been any evidence of negligence on the defendant in drawing the engine the way they did, but that this did not of itself relieve them of liability. It was contended that when the injury results from an inherent defect in the article carried, the carrier is excused, but in the learned judge's opinion that was much too general a proposition and he could not

see any principle upon which the defendants could claim to be excused the consequences of their act. He therefore gave judgment for the plaintiffs (shippers)." (Parentheses supplied.)

In reversing on appeal the Court said:

"• • • • the learned judge has limited the rule as to non-responsibility of the carrier—the accident happening by the inherent vice or inherent defect when it is in the hands of the carrier—to an extent that he ought not have done. That being so, in my opinion, when you once get that the article is being carried in the ordinary way and every precaution has been taken consistently with that mode of carriage and the accident happens, as the learned judge has found, by the breaking down of the article itself, which causes the whole damage, then the carrier is not responsible. I think Mr. Lush (attorney for the plaintiff) who was very fair in the matter, must have contended, in order to succeed, that, even if the shaft had broken and no other damage had happened that the Railway Company would have been responsible for that shaft and would have had to put it back into its previous condition."

Referring to *Williston on Contracts, Revised Edition*, Volume 4, Sec. 1041, page 2907, it is found:

"One who lets property for hire may reasonably be subjected to the same implied warranties as one who sells goods."

Judge Conger, the parties hereto, and all interested persons agree that the doctrine of implied warranty has been applied previously to the obligation of the shipper, at least in regard to dangerous articles. In support of this proposition the Petitioner and others cite *Brass* v. *Maitland*, 119 Eng. L. R. 940 (1856); *Bamfield* v. *Goole*, 2 K. B. 94 (1910); *Grt. No. Ruy.* v. *L. E. P. Trans. & Depos. Ltd.*,

2 K. B. 742 (1922). There appears to be no authority for limitation of the principle of these cases to dangerous articles only.

In *Bradley* v. *Lake Shore & M. S. Ry. Co.*, 129 N. Y. S. 1045, 1047 (Sup. Ct.) (1911), specific reference is made to a failure of compliance with the provision of the classification filed with the Interstate Commerce Commission. On this basis, it was determined that the acids should have been differently packed before being shipped. It is only in obiter dicta that residual reference is made to the common law duty of the shipper concerning the dangreous commodity.

Similarly, in *Gr. No.* v. *L. E. P. Trans. & Depos. Ltd.*, 2 K. B. 742 (1922), the commodity, perhydrol, was also not packed in accordance with the classification. In finding a breach of implied warranty in reference to the tariff provision, it was stated:

> "The duty is at least as large as that which is imposed upon a person who tenders goods for carriage on a general ship which is the foundation of the warranty • • •."

It is also stated:

> "In my opinion, the foundation of those judgments is, that where a person requests another to perform a statutory duty, there is an implied promise to indemnify him if he suffers damage in the performance of it."

Thus, the nature of the product contained is not necessarily the legal test. The underlying rationale of the established (so called) dangerous article cases is applicable to the instant case in that the shipper failed to comply with the terms of the "Packing Rule" as required by the "law of the case." *Bradley* v. *Lake Shore & M. S. Ry. Co.*, 129 N. Y. S. 1045 (1911). Nor is it conceded that methyl

phenol acetate is not corrosive or dangerous by legal interpretation. It would be so argued, if essential.

Other authorities have passed on the issue of a shipper's liability for defective containers. *The Interstate Commerce Commission* in *So. Mo. Millers Club* v. *St. Louis & San Francisco R. R. Co. et al.*, 25 I. C. C. 245, 250 (1913) said:

> "The shipper should so pack and load his commodity as *to insure* against damage by leakage from the package or otherwise, due to the ordinary incident of transportation." (Emphasis supplied.)

Nelson v. *Stephenson*, 12 N. Y. Super. 538, 5 Duer 538 (1856), involved an obviously harmless commodity, i.e., molasses, which had leaked in transit due to defective drums. The court said:

> "The owner of liquids or any articles especially in casks of any description is, in the first instance, chargeable with the duty of supplying proper ones and would presumptively be responsible for a loss arising from their insufficiency or defects."

Based on the foregoing, it is respectfully contended that the issues are neither novel, unsettled, nor important. To the contrary, it would appear that the decision of the Court of Appeals concerns itself with old ordinary questions, and that it was rendered in the accepted and usual course of judicial proceedings.

IV

The Court of Appeals' decision is not in conflict with any other decision.

It is strenuously asserted that *Commodity Credit Corp.* v. *Norton*, 161 F. 2d 167 (C. C. A. 3rd) (1948) is in conflict with other decisions. To the contrary, the case is obviously harmoniously reconciled with any other decision, and is most favorable to the Respondent-Carrier. It surely must be cited in favor of his position.

Firstly, it establishes that a latent defect is in the exact same category as an excepted peril. Thus, immediately, any of the Petitioner's arguments concerning the liability of the motor carrier under the bill of lading, or under 49 U. S. C. 20(11), or of a contention of an irreconcilable position of dual insurers, is dismissed.

Commodity Credit Corp. v. *Norton* (supra) involved a loss of castor oil from recoopered drums. The shipper sued the carrier for the loss. The crux of a reversal stemmed from a charge by the trial court which inferred to the jury that the defendant motor carrier would be liable only in the event it were negligent. It is agreed as a legal proposal that there may be liability upon a motor carrier for causes other than negligence, specifically its contractual obligation, outside of the excepted causes. However, such an admission does not embrace the contentions of the plaintiff-shipper in the *Commodity Credit* case supra, as listed on page 28 of the Petitioner's brief.

The basic difference in the instant matter is that the carrier here sustained the burden of proof by affirmatively showing that the loss occurred because of the latent defect. This element was missing in the *Commodity Credit* case. In other words, as the *Commodity Credit* case says, the exercise of due care, by itself, is not a motor carrier defense.

There must be proof of an excepted cause. Such proof was found in the instant case.

Nor is there any conflict with the instant or other decisions in regard to the burden of proof concerning negligence. The *Commodity Credit* case merely makes the distinction that *negligence may be involved* upon proof of an excepted cause under the bill of lading, including latent defect rather than *negligence being the issue* without proof of such exception. The language of the Court makes the proposition clear as follows:

> "The manner of handling the cargo, therefore, would be entirely irrelevant *except in the event of an affirmative finding by the jury of a latent defect*, or unless the damage or loss is brought within an excepted peril which would give rise to the application of the rule of negligence. Consequently, a finding that there was no 'rough handling' would not require a determination of the cause in favor of the defendant *sans the additional finding of a latent defect.*" (Emphasis supplied.)

To carry the matter further in regard to negligence it is the federal rule that if a carrier shows the loss to have arisen from an excepted cause, it does not have to show freedom from negligence. The burden of proof is still on the plaintiff (shipper). This conclusion is stated in *Farr Co. v. Union Pacific R. R. Co.*, 106 F. 2d, 437 (C. C. A. 10th) (1939):

> "When damage to goods while in the course of transit is shown to have resulted from an excepted cause the carrier is exempt from liability unless the shipper proves that the carrier was guilty of some negligence in not providing for the safety of goods and that the carrier could have done so."

But the factual issues of negligence and contributory negligence were previously decided adversely to the Petitioner (Point I, p. 8 *et seque*, Point II, p. 11, *et seque*, *supra*).

Other cases alleged to be at variance with the instant case, prove, upon examination, to contain chiefly a different set of facts that change the result of the case, but not the basic law involved. In *National Distillers P. Corp.* v. *Companhia Nacional, etc.*, 107 F. Supp. 65 (U. S. D. C., Pa.) (1952), the railroad was sued for loss of wine through leaking pipes. The pipes had been damaged in previous transportation but were recoopered. The most interesting fact in the case is that the claim agent for the railroad testified, on the basis of similar shipments that the containers were inadequate. Thus, the defendant carrier became involved in the dilemma that if the containers were patently inadequate, that exception should have been taken. Furthermore, it appears that even if his testimony might have been of value in resolving the problem, it was neutralized by similar testimony by plaintiff's witnesses, who showed that they had successfully used such containers on other shipments. Again, there was no actual proof of latent defect, as in the instant case.

More important is the case of *W. A. Hover & Co.* v. *Denver & R. G. R.R. Co.*, 17 F. 2d 881 (C. C. A. 8th) (1927). In this case the railroad carrier was the plaintiff suing to recover on the theory of a violation of Interstate Commerce Commission requirements concerning the gauge of the containers involved. The basis for liability was clearly set forth by the Court as follows:

> "Where a statute imposes a duty upon a person for the protection or benefit of others and he neglects to perform that, he is guilty of negligence and is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute is designed to prevent and which were proximately caused by such negligence. (Citations.)"

The Court then proceeded to find that the statute was unauthorized and therefore by the proof submitted, the violation thereof, as alleged, could not be deemed to constitute negligence. The Court continued to consider that if

there had been independent proof or "any evidence" to show causal relationship between the use of the containers of lesser gauge than specified under the statute, it would have permitted a jury question. But the matter was before the Court on motion to dismiss. The conflicting evidence showed that there were other probable causes. Therefore, the whole matter was considered as conjecture and recovery was not allowed.

Again it can be seen that the quality of the evidence was not comparable to the instant case in which the sole cause for the damage was a failure of the drums because of a latent defect. The principles of the whole case indicate that if the proof had been of the quality of the instant case that the carrier would have prevailed.

The statement of the Court in *Hallanan* v. *Eureka Pipe Line Co.*, 261 U. S. 387, 393 (1923), is respectfully quoted:

> "If it be suggested, that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

V

There is no miscarriage of justice.

To be considered as arriving at a just legal decision is the every day meaning of the perspective of both parties stripped of attempted artificial legal involvement. The carrier in essence says:

> "Pack your commodity in such a manner that I may transport your goods safely to guard against accident. I also require that the packing be sufficient to enable me to carry your product as you gave it to me to its destination. Finally, the container must be sturdy enough so that other items I must legally carry, because of the public nature of my business, are not damaged due to failure of your container. If you do so, and there is a loss, except for a few stated reasons, I will offer no other excuse but will accept full responsibility for any and all losses. This is my packing rule."

In contrast, the shipper argues:

> "We have millions of drums that we use over and over again. We recondition them and cannot always know when they will wear out. We want you to continue to carry these repaired drums, but if for any reason whatsoever they happen to fail while in your possession, don't blame us. We do not know just when they will fail, so that failure cannot be considered intentional. When one of these containers gives out while you are transporting it, we want you to assume full responsibility for any damage caused. After all, you are a public servant and generally considered responsible for anything and everything. Bosh to your 'Packing Rule'! Otherwise, it will cost me money for better drums or for private protection against costly damage suits."

The Court of Appeals sensed the injustice of the shipper's contentions. In regard to the protests of the Petitioner that the test of reasonable "reasonable care" as required in ordinary negligence should be applied, *Dean Prosser, in the Law of Torts* (1955) page 318, aptly states:

> "• • • the basis of his liability • • • is the creation of an undue risk of harm to other members of the community."

Perhaps the best solution that shippers of goods in metal containers could achieve is to follow the recommenda-

tions of the distinguished *Dr. B.* Floyd Brown, who testified in this proceeding. He set them forth in *Bulletin No. 9,* entitled "Failures in Steel Shipping Drums—II", Industrial Information Series, Department of Engineering Research, North Carolina State College, Raleigh, North Carolina (1954), on page 17, as follows:

> "Recommendations to Minimize Failures
>
> 1. Increase the thickness of the bottom head of 55 gallon drums to 17 gauge.
>
> 2. Develop standards of drums acceptable for reconditioning which eliminate the severely battered, the severely rusted, or the overaged, and discourage the reconditioning of those drums which fail to meet specifications.
>
> 3. Collect actuarial data to determine the optimum point for retiring overaged drums regardless of their appearance.
>
> 4. Use meticulous care in surface preparation and in painting and in general measures to protect against corrosion."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

NATIONAL FREIGHT CLAIM COUNCIL OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Amicus Curiae.
By LOUIS SILVER, Attorney,
880 Bergen Avenue,
Jersey City, N. J.

Of Counsel:
JOHN M. MILLER, Attorney,
1424 Sixteenth Street, N.W.,
Washington, D. C.

Consent to File Brief *Amicus Curiae*

SUPREME COURT OF THE UNITED STATES

October Term, 1957

Docket No. 472

A. Maschmeijer, Jr., Inc.,

Petitioner,

vs.

Eastern Motor Express, Inc.,

Respondent.

Re: Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The undersigned, being counsel for the respective parties in the above entitled matter, hereby consent to the filing of a brief *Amicus Curiae* to the Supreme Court of the United States, by Louis Silver as attorney for the National Freight Claims Council of the American Trucking Associations, Inc.

Jerome G. Greenspan,
Counsel for Petitioner.

Zelby & Burstein,

By Herbert Burstein,
Counsel for Respondent

Certificate of Service

I hereby certify that I have this day served the foregoing brief amicus curiae upon Petitioner, by delivery of three copies thereof to its counsel, Jerome G. Greenspan, Esq., 169 William Street, New York, N. Y., this 31st day of January, 1958.

LOUIS SILVER.